STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Jansen, P.J. and Markey and Gage, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 126025

-vs-

DUANE JOSHUA HOUSTON,

Defendant-Appellant.

Court of Appeals No. 245889
Genesee County CC No. 02-9348-FC

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF MICHIGAN

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COUNTERSTATEMENT OF JURISDICTION

Amicus Curiae adopts Plaintiff-Appellee's statement of jurisdiction. On November 4, 2004 this Court issued the following order:

> On order of the Court, the application for leave to appeal the April 1, 2004 judgment of the Court of Appeals is considered, and it is GRANTED, limited to the following issues: (1) whether Offense Variable 3, MCL 777.33, was properly scored; and (2) whether a sentence of life falls within the statutory sentencing guidelines for second-degree murder for a defendant who is an habitual offender.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. DOES THE LANGUAGE OF THE STATUTES AS WELL AS THE LEGISLATIVE PURPOSES UNDERPINNING THE SENTENCING GUIDELINES COMPEL THE CONCLUSION THAT THE GUIDELINES SHOULD BE SCORED TO REFLECT THE DEATH OF THE VICTIM AND THAT A LIFE SENTENCE WAS A VIABLE OPTION FOR A DEFENDANT WITH GUIDELINES OF OVER 300 MONTHS?

The sentencing court:	held that offense variable three was properly scored at 25 points for life threatening injury. It did not reach the issue of whether a sentence of life was viable option in a lower sentencing grid.
The Court of Appeals:	assumed that offense variable three was improperly scored but found that a life sentence was proper.
Defendant-Appellant:	answers both questions, "no".
Plaintiff-Appellee:	answers both questions, "yes".
Amicus Curiae:	answers both questions, "yes".

COUNTERSTATEMENT OF FACTS

Amicus Curiae adopts the statement of facts as will be set forth by the Plaintiff-Appellee.

ARGUMENT

I. THE LANGUAGE OF THE STATUTES AS WELL AS THE LEGISLATIVE PURPOSES UNDERPINNING THE SENTENCING GUIDELINES COMPEL THE CONCLUSION THAT THE GUIDELINES SHOULD BE SCORED TO REFLECT THE DEATH OF THE VICTIM AND THAT A LIFE SENTENCE WAS A VIABLE OPTION FOR A DEFENDANT WITH GUIDELINES OF OVER 300 MONTHS.

A. Summary of the argument

Offense Variable three (hereinafter "OV 3"), MCL 777.33(1)(c), allows scoring of the guidelines if life threatening injury to a victim occurs. The ordinary meaning of life threatening injury includes injury which threatens a victim's life so severely that the victim actually dies. The underlying purposes of the sentencing guidelines also reveal that scoring for the death of the victim is consistent with the intent of the Legislature to impose similar sentences for similar conduct, to include routinely occurring aggravating factors in the scoring of the guidelines, and to elevate sentences for violent offenders. With defendant's construction of OV 3, the guidelines would not take into consideration the death of the victim, the court could depart from the guidelines for this reason, and individuals who were guilty of the same conduct would receive disparate sentences.

Though the Legislature has not provided sentencing grids for habitual offenders, the implication from the sentencing grids established for first-time offenders as well as the clear intent of the Legislature to punish recidivists more stringently than first-felony offenders, indicate that a life sentence is an option in defendant's case where his guidelines were scored at over 300 months.

B. The genesis of the sentencing guidelines

The sentencing guidelines are the product of an evolution in sentencing practices. The purpose of this movement was to ensure that similarly-situated offenders are sentenced to similar

sentences. If the sentencing guidelines are scored for the death of the victim, a routinely aggravating factor, and recidivists are punished more severely under the guidelines than first-felony offenders, the goal of sentencing equity is met.

The United States Supreme Court indicated that the fundamental respect for humanity requires consideration of the character and record of the individual offender and the circumstances of the particular offense in determining a just and fitting sentence.[1] This sentiment was also reiterated by this Court when it said, "[A]s in any civilized society, punishment should be made to fit the crime and the criminal." [2]

In the later eighteenth century, England routinely mandated determinate sentences for felony offenses. With these sentencing systems, the courts had no discretion regarding the penalty and the sentences did not allow for any individualization of punishment despite major differences in the ways that crimes were committed.[3] However, because of the criticism that "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender", the United States moved toward a system of indeterminate sentencing in the early nineteenth century.[4] The goal of indeterminate sentencing schemes was to fix punishment based on the harm resulting from the crime.[5] Courts believed one

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[1] *Lockett v Ohio*, 438 US 583, 603-605; 98 S Ct 2954; 57 L Ed 2d 973 (1978); *Williams v New York*, 337 US 241, 247; 69 S Ct 1079; 93 L Ed 2d 241 (1949)

[2] *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003) *motion for clarification den* ___Mich___; 668 NW2d 622 (2003)

[3] *Apprendi v New Jersey*, 530 US 466, 479; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Williams v New York,* 337 US at 248; *Jones v United States*, 526 US 227, 244; 119 S Ct 1215; 143 L Ed 2d 311 (1999)

[4] *Pennsylvania ex rel. Sullivan v Ashe*, 302 US 51, 55; 58 S Ct 59; 82 L Ed 2d 13 (1937); See also: *Apprendi* v *New Jersey*, 530 US at 481-482; *Williams v New York, supra*; *Burns v United States*, 287 US 216, 220; 53 S Ct 154; 77 L Ed 2d 266 (1932)

[5] *Jones v United States,* 526 US at 257 (Kennedy, J., dissenting)

of the important factors in the individualization of a sentence, was whether the crime was one against property or whether it involved danger to human life.[6]

Throughout much of the nineteenth and twentieth century, indeterminate sentencing systems represented a valuable reform in response to the determinate sentencing schemes. Nevertheless, one of the most serious criticisms of indeterminate sentencing was that it resulted in significant disparities in the sentences imposed upon similarly-situated defendants.[7] Critics not only assailed the lawlessness of indeterminate sentencing, but noted that it obscured the actual punishments being imposed and provided no mechanism to implement a systematic sentencing policy.[8]

In response to the claims of unfettered discretion of sentencing judges resulting in disparate sentences for similarly-situated offenders, the federal government and fifteen states

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[6] *Williams v New York,* 337 US at 249, n 13; *Jones, supra*

[7] See: Arthur W. Campbell, *Law of Sentencing*, §1:3, at 9-10 (2d ed, 1991); *Jones v United States*, 526 US at 271 (Kennedy, J. dissenting)("In seeking to bring more order and consistency to the process, some States have sought to move from a system from indeterminate sentencing or a grant of vast discretion to the trial judge to a regime in which there are more uniform penalties prescribed by the Legislature.")

[8] Arthur W. Campbell, *Law of Sentencing, supra* at 10-12; American Law Institute, *Model Penal Code: Sentencing Report*, p 64-65, 66-68, 72 & n. 90, 74-75 (2003)

adopted guidelines in the late 1980's and 1990's.[9]

Michigan was one of the fifteen states which adopted sentencing guidelines to shape the sentencing decisions of the judiciary. In 1979, this Court appointed an advisory committee to research and design sentencing guidelines to address assertions of unwarranted sentencing disparity and unequal justice.[10] In selecting guidelines for inclusion, the Sentencing Guidelines Advisory Committee sought to identify guidelines that would be a) nonprejudicial, b) uniformly mitigating or aggravating, c) frequently occurring, d) related to the goals of sentencing, and e) objective in the sense that one could write instructions that would lead most people to be able to reach the same categorical decisions.[11]

In 1983, this Court stated, "[T]he policy of this state favors individualized sentencing for every convicted defendant. The sentence must be tailored to fit the particular circumstances of

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[9] ALI Report at 47; See also: *Witte v United States*, 515 US 389, 402; 115 S Ct 2199; 132 L Ed 2d 351(1995)(indicating that the guidelines make the sentencing process more transparent); *Almendarez-Torres* v *United States*, 523 US 224, 246; 118 S Ct 1219; 140 L Ed 2d 350 (1998)(stating that the goal of the sentencing guidelines was to channel the discretion of the judges using "sentencing factors"); *Blakely v Washington*, ___US ___; 124 S Ct 2531, 2544; __LEd 2d___ (2004)(O'Connor, J., dissenting)(indicating when discussing indeterminate sentencing regimes, "This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories."); U.S. Code Cong. & Admin. News 1983, 3182, 3221 (Senate Report on precursor to federal Sentencing Reform Act of 1984)("[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, convicted under similar circumstances . . .); *People v Milbourn*, 435 Mich 630, 646; 461 NW2d 1 (1990)(indicating that "[f]or decades, empirical studies repeatedly showed that similarly situated offenders were sentenced, and did actually serve, widely disparate sentences." citing Ilene Nagel, *Forward, structuring sentencing discretion: The new federal sentencing guidelines,* 80 J.Crim.L & Criminology, 883-884 (1990); *United States v Booker*, 543 US ___;___S Ct___;___L Ed 2d___ (2005), slip. op. at 7, 10 (Breyer, J.,)(indicating that the purpose of the guidelines was to promote uniformity in sentencing); See also: slip op at 2 (Scalia, J., dissenting in part)

[10] Michigan Sentencing Guidelines Commission, *Report of the Michigan Sentencing Guidelines Commission,* (1997) p 1

[11] *Milbourn, supra* at 660, n 28

the case and the defendant."[12] This Court noted, "[i]ncreased uniformity in sentencing similarly-situated defendants is said to be in keeping with our constitutional concept of a unified judiciary in this state."[13] This Court added:

> [t]he purpose of the sentencing guidelines is to ensure that sentencing decisions focus on a consistent set of legally relevant factors and to ensure that these factors are assigned equal importance for all offenders. This should result in sentences which are imposed in a predictable, coherent, and consistent manner, thus eliminating disparity in the sentences of similarly situated defendants.[14]

This Court also noted that after *People v Coles,* 417 Mich 523; 339 NW2d 440 (1983) "the national trend has pushed forward. Our sister states have continued to adopt a variety of measures to diminish the recognized evils of disparate sentencing."[15]

The same year as *Coles* was decided, the Sentencing Commission distributed the guidelines for use on a voluntary basis. In 1984, this Court mandated statewide use of the guidelines. A revised version of the judicial guidelines took effect in 1988. However, because the recommended ranges found in the judicial guidelines were not the product of legislative action, a sentencing judge was not necessarily required to impose a sentence within those ranges.[16] Because the guidelines were not mandatory, "[m]any people [were] concerned with the failure of indeterminate sentencing to provide for an evenhanded standard of punishment for crimes. Many believe[d] that indeterminate sentencing systems [] contributed to sentencing disparities where two offenders who commit very nearly the same crime and who have similar criminal histories may be sentenced to widely differing minimum terms."[17] Furthermore, rather than providing a

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[12] *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983) citing *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973)
[13] *Id.* at 545
[14] *Id.* at 549 n 31
[15] *Milbourn*, *supra* at 663
[16] *Babcock*, *supra* at 254; *People v Mitchell*, 454 Mich 145, 174-175; 560 NW2d 600 (1997)
[17] House Legislative Analysis, HB 5419, May 12, 1998, September 23, 1998; Senate Fiscal Agency Bill Analysis, SB 826, October 23, 1998 [Attachment A]

considered statement of public policy regarding criminal sentencing, the guidelines merely mirrored the sentencing practices of judges across the state (though the drafters disregarded the highest and lowest twelve and one-half percent of the sentences imposed on offenders). The guidelines also only accounted for about 100 offenses and were criticized as being overly simplistic.[18]

In 1994, while the judicial guidelines were still in effect, the Legislature appointed an independent commission and charged it with designing and recommending to the Legislature guidelines which would have the status of law. The sentencing commission was able to evaluate the effect of the judicial sentencing guidelines on trial and appellate courts prior to adoption of legislative sentencing guidelines.[19] The Legislature gave the sentencing commission the following tasks concerning the sentencing guidelines:

> Develop sentencing guidelines, including sentence ranges for the minimum sentence for each offense and intermediate sanctions as provided in subsection (3), and modifications to the guidelines as provided in subsection (5). The sentencing guidelines and any modifications to the guidelines shall accomplish all of the following:
>
> (i) Provide for protection of the public.
>
> (ii) An offense involving violence against a person shall be considered more severe than other offenses.
>
> (iii) Be proportionate to the seriousness of the offense and the offender's prior criminal record.
>
> (iv) Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences. ["Offense characteristics" means the elements of the crime and the aggravating and mitigating

[18]House Legislative Analysis, HB 5419, May 12, 1998, September 23, 1998; Senate Fiscal Agency Bill Analysis, SB 826, October 23, 1998 [Attachment A]; *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994); *People v Houston*, 448 Mich 312, 326 n 8, 327, 329 n 12; 532 NW2d 508 (1995)

[19] *Mitchell*, *supra* at 174 n 34

> factors relating to the offense that the commission determines are appropriate and consistent with the criteria mentioned in section 33(1)(e) of this chapter.[20]]
>
> (v) Specify the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper.
>
> (vi) Establish sentence ranges for imprisonment that are within the minimum and maximum sentences allowed by law for the offenses to which the ranges apply.
>
> (vii) Establish sentence ranges the commission considers appropriate. [21]

The philosophy of the guidelines was to ensure that violent and repeat offenders would be treated more severely than other offenders and that sentencing practices would be more proportionate to both the seriousness of the offense and the offender's prior criminal record.[22] Departures from the guidelines would be exceptions only allowed when substantial and compelling reasons were present.[23] In the mission statement of the Michigan Sentencing Guidelines Commission, the Commission stated that its goal was, to "[d]evelop sentencing guidelines which provide protection for the public, are proportionate to the seriousness of the offense and the offender's prior record, and which reduce disparity in sentencing throughout the state." [24]

Though the commission began its work in 1995, the new statutory guidelines did not go into effect until January 1, 1999.[25] After 1999, the sentencing commission was charged with

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[20] PA 1994, No. 445; MCL 769.31(e) [modified by PA 2002, No. 31] See n 21 *infra*
[21] PA 1994, No. 445; MCL 769.33 repealed [by PA 2002, No. 31] after the Sentencing Guidelines Commission had completed its task (i.e. after the sentencing guidelines had been passed by the legislature and initial modifications had been proposed).
[22] House Legislative Analysis, HB 5419, May 12, 1998, September 23, 1998; Senate Fiscal Agency Bill Analysis, SB 826, October 23, 1998 [Attachment A]; *Babcock, supra* at 263-264
[23] MCL 769.34(3)
[24] *Report of the Michigan Sentencing Commission, supra* at 6
[25] House Legislative Analysis, HB 5419, May 12, 1998, September 23, 1998

developing modifications to the guidelines until January 1, 2001.[26]

Under the legislative guidelines, to determine a minimum sentence range, the sentencing court is required to determine the offense category.[27] Then, the sentencing court must determine which offense variables (OVs) are applicable, score those variables and total the points to determine the total OV score.[28] The sentencing court also must score all prior record variables (PRVs).[29] The offender's OV score and PRV score are then used to determine the appropriate cell of the applicable sentencing grid.[30]

One of the significant differences between the judicial and statutory guidelines is that the court no longer scores specific guidelines for very similar offenses such as assault, burglary, criminal sexual conduct, drug, fraud, homicide, larceny, property destruction, robbery and weapons possession. Instead, the crimes are divided into the broader categories of crimes against a person, crimes against property, crimes involving controlled substances, crimes against public safety, and crimes against public trust.

Therefore, when the judicial guidelines were scored for a homicide, they were scored to distinguish one murder from another. The court used the same guidelines when scoring every crime involving homicide and the court used sentencing grids specifically drafted only for homicides. With the legislative guidelines, on the other hand, the same sentencing guidelines are used for all crimes against a person which include homicides and non-homicides and, except for the M-2 sentencing grid, the court uses the sentencing grids A-H for both fatal and non-fatal crimes. Therefore, in scoring points under the offense variables, the court must by its scoring

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[26] *Id.*
[27] MCL 777.21(1)(a)
[28] *Id.*
[29] MCL 777.21(1)(b)
[30] MCL 777.21(1)(c); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004)

differentiate between non-fatal and fatal crimes.

C. The plain language of OV 3 as well as the legislative intent reveal that the guidelines should be scored to reflect the death of the victim.

Standard of Review:

The defendant was convicted of second-degree murder, MCL 750.317, for a crime which occurred on December 22, 2001. Therefore, the statutory sentencing guidelines applied to defendant's offense.[31] Scoring decisions for which there is any supporting evidence will be upheld.[32] However, the proper application of the statutory sentencing guidelines presents a question of law reviewed *de novo*.[33] Prior to January 27, 2005, the Court of Appeals in unpublished opinions had been split on the proper interpretation of MCL 777.33(1)(b), OV 3, which deals with the scoring of life threatening injury in homicide cases.[34] However, after this Court granted leave in this case, the Court of Appeals in a published decision held that no points could be scored for OV 3 in cases of homicide.[35]

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[31] *People v Daily*, ___Mich___; 678 NW2d 439 (2004)

[32] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002)

[33] *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001)

[34] *People v Houston*, 261 Mich App 463; 683 NW2d 192 (2004); Compare: *People v Hauser*, unpublished opinion per curiam of the Court of Appeals, decided October 29, 2002 (Docket No. 239688), *lv den* 468 Mich 861 (2003); *People v Edelen*, unpublished opinion per curiam of the Court of Appeals, decided December 23, 2003 (Docket No. 242167); *People v Stanko*, unpublished opinion per curiam of the Court of Appeals, decided January 27, 2003 (Docket No. 242876) to *People v Smith*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2003 (Docket No. 234830) *lv den* 469 Mich 978; 673 NW2d 761 (2003); *People v Williams*, unpublished opinion per curiam of the Court of Appeals, decided October 11, 2002 (Docket No. 224727) *lv den* ___Mich ___ ; 659 NW2d 238 (2003) Also see: *People v Hauser*, 468 Mich 861; 657 NW2d 121 (2003) (Markman, J. and Young, J., dissenting from den of lv to appeal) [Attachment B]

[35] *People v Brown, Jr.*, ___Mich App___; ___NW2d ___ (2005)

Issue Preservation:

Defendant objected to the scoring of OV 3 at sentencing and preserved this issue for appeal.[36]

Discussion:

One of the variables in the guidelines developed by the sentencing commission and adopted by the Legislature was OV 3, MCL 777.33, which governs the circumstances under which injury to the victim can be used to elevate a defendant's guidelines. In this case, the sentencing court scored 25 points for life threatening injury inflicted on the victim. Here, defendant shot the victim in the head and the victim later died from this injury.[37] Both the plain language of the statute and the intent of the Legislature support scoring of OV 3 in this case.

1. The plain language of the statute

Because second-degree murder is a crime against a person, the Legislature has directed the court to score MCL 777.33, OV 3.[38] In December 2001, when defendant committed the instant offense, MCL 777.33 provided:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 **by determining which of the following apply** and **by assigning the number of points attributable to the one that has the highest number of points**:
>
> (a) A victim was killed.....100 points
> (b) A victim was killed .....35 points
> (c) **Life threatening injury** or permanent incapacitating injury **occurred to a victim** .....25 points
> (d) Bodily injury requiring medical treatment occurred to a victim .....10 points
> (e) Bodily injury not requiring medical treatment occurred to a victim .....5 points
> (f) No physical injury occurred to a victim..... 0 points

[36] MCR 6.429(C); *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004)
[37] PSR at 2 [attached under separate cover sheet]
[38] MCL 777.16p; MCL 777.22(1)

(2) All of the following apply to scoring offense variable 3:

> (a) In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.
>
> (b) **Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.**
>
> (c) Score 35 points if death results from the commission of a crime and the elements of the offense or attempted offense involve the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive under the influence or while impaired causing death.
>
> (d) Do not score 5 points if bodily injury is an element of the sentencing offense.

(3) As used in this section, "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.[39] (emphasis supplied)

a. The ordinary meaning of "life threatening" injury

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature.[40] To determine the Legislature's intent, this Court must first look to the specific language of the statute. If the plain and ordinary meaning of the statute is clear, judicial construction is not permitted. A court may not go beyond the words of the statute to determine the Legislature's intent unless the statutory language is ambiguous.[41]

The language of MCL 777.33(1)(c) is clear; "life threatening" injuries mean injuries which threaten the victim's life. The Legislature has not specifically listed the common types of injury which fall into the category of life threatening; therefore, the plain meaning of the word

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[39] On September 30, 2003, the Legislature elevated the number of points to 50 points in subsections (1)(b) and (2)(c). PA 2003, No. 134

[40] *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000) *lv den* 464 Mich 858; 630 NW2d 334 (2001)

[41] *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999); MCL 8.3a

should be applied. "Threaten" has been defined as "to be a menace or source of danger to" or "to indicate impending. . .difficulty." "Injury" has been defined as "harm or damage sustained" and "injure" means "to do or cause harm *of any kind.*"(emphasis supplied)[42] It is axiomatic that injuries which are so severe that they eventually cause a victim's death had first previously threatened his life. "Indeed, the victim was injured to the point of death."[43] For example, the Texas and New York Legislatures when defining a similar term, "serious bodily injury", in their criminal codes, include death as well as other types of injury.[44] In this case, the victim was shot in the head and pronounced dead after arrival at the hospital.[45] Clearly the victim's life was "threatened" by the injury inflicted by defendant.

b. Other subsections in the same statute

The Legislature is presumed to be aware of the consequences of the omission of language when it enacts the laws that govern the state.[46] In this case, the Legislature specifically precluded only the scoring of 100 points [MCL 777.33(1)(a)] if a homicide is the sentencing offense; however, it did not preclude 25 points [MCL 777.33(1)(c)] from being scored.

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[42] *Random House Webster's College Dictionary*, 2nd ed. (1997) See: *People v Lange*, 251 Mich App 247, 253; 650 NW2d 691 (2002), indicating that when a term is not specifically defined in the sentencing guidelines, it is permissible for a court to consult dictionary definitions in order to aid in construing the term "in accordance with [its] ordinary and generally accepted meaning[]." citing *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999))

[43] *Hauser*, 468 Mich at 861 (Markman, J., dissenting)

[44] In Texas the legislature defined "serious bodily injury" as "bodily injury that creates a substantial risk of death *or that causes death*, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." (emphasis supplied) Texas Penal Code §1.07 In New York, the legislature defined "serious physical injury" as "physical injury which creates a substantial risk of death, *or which causes death* or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily injury." (emphasis supplied) New York Penal Code §10.00; See also: *People v Cathey*, 261 Mich App 506, 511, 514; 681 NW2d 661 (2004) *lv den* 467 Mich 898; 664 NW2d 328 (2002)(in which the court turned to sister states' definitions of "bodily injury" for guidance when the Legislature had furnished no definition in MCL 777.33(1))

[45] PSR at 2 [attached under separate cover sheet]

[46] *People v Ramsdell*, 230 Mich App 386, 392; 585 NW2d 1 (1998)

Defendant contends that 0 points should be scored in this case; however, the Legislature specifically stated that 0 points should be scored when ***no physical injury occurred to a victim.***[47] Because the victim was injured to the point of death in this case, 0 points clearly is not appropriate.[48] The Legislature intended sentencing courts to accurately determine the highest number of points to be scored under the guidelines.[49] A 25-point scoring was consistent with the facts.

c. Other statutes in the same act

If the Legislature had meant to preclude scoring any points for this variable when homicide is the sentencing offense, it could clearly have done so. MCL 777.22 states in pertinent part:

> (1) **For all crimes against a person, score offense variable**s 1, 2,**3**, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20. Score offense variables 5 and 6 for homicide, attempted homicide, conspiracy and solicitation to commit a homicide or assault with intent to commit murder. Score offense variable 16 under this subsection for a violation or attempted violation of section 110a of the Michigan penal code, 1931 PA 328, MCL 750.110a. Score offense variables 17 and 18 if the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. (emphasis supplied)

MCL 777.22(1) specifically limits the scoring of certain offense variables to certain crimes. The statute states that OV 3 should be scored for ***all*** crimes against a person which includes all homicide offenses. Had the Legislature intended to exclude OV 3 from scoring in all homicide cases, it could have done so. For example, MCL 777.21(1) specifically states that the courts should score OV 16 only when the crime of home invasion or attempted home invasion is being scored. MCL 777.22(1) also states that OVs 5 and 6 should only be scored for crimes of

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[47] MCL 777.33(1)(e)

[48] See: *Hauser,* 468 Mich at 861 (Markman, J., dissenting)("Offense variable three also cannot be scored at 0 points, because there was 'physical injury . . .to a victim.'")

[49] *People v Libbett*, 251 Mich App 353, 367; 650 NW2d 407 (2002)

homicide, attempted/conspired/solicited homicide or assault with intent to murder and that OV 17 and 18 should only be scored if the offense or attempted offense involves operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. If the Legislature had intended no scoring of OV 3 for homicides, it would have stated not to score OV 3 for these crimes in MCL 777.22(1).

Defendant states that this Court should look to the judicial guidelines which did not allow OV 2, physical attack/injury, to be scored in crimes of homicide. However, all homicides were scored using the same judicial guidelines, and therefore the guidelines for homicides were scored solely to differentiate between homicides. Under the statutory guidelines, however, both homicides and non-homicides are scored using the same guidelines and the guidelines must be scored to distinguish between fatal and non-fatal crimes.

d. Statutory language added by defendant

In interpreting the statute as defendant does, he adds language to MCL 777.33 because he is essentially stating that points can be scored only when the injury was "short of death". "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include."[50] When commenting that the court should not add words when interpreting a statute, this Court stated:

[50] *In Re Wayne County Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998)

> When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case . . . (emphasis original) [51]

"The Legislature is presumed to be familiar with the principles of statutory construction and when promulgating new laws it is presumed to be aware of consequences of its use or omission of statutory language."[52] Instead of focusing on what the Legislature said through the text of the statute, defendant is determining what the Legislature must have really meant despite the language it used.[53]

In this case, the Legislature did not condition the scoring of OV 3 on injury short of death. Instead, the Legislature stated only that 100 points cannot be scored if the sentencing offense is homicide; it does not state that 25 points should not be scored.

e. Scoring in OUIL causing death cases

Defendant claims that the statutory amendments to OV 3 allowing points to be scored for the death of a victim in OUIL causing death cases undercuts the prosecution's position. Although the Legislature wanted to elevate scoring in OUIL causing death cases to score 35 [or 50] points,

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[51] *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999) In *McIntire*, the defendant was charged with murder. Though the defendant was initially granted immunity from prosecution from the murder in exchange for testimony, the prosecution later determined that defendant lied to the grand jury and the prosecution revoked his immunity agreement.

The circuit court, however, dismissed defendant's murder charges on the ground that the immunity statute, MCL 767.6 was not conditioned on truthful testimony by the person who received immunity. The Court of Appeals disagreed holding that the statute *implicitly* included a condition of truthful testimony.

This Court, adopting Judge now Justice Young's dissenting opinion, reversed the Court of Appeals and reinstated the order of dismissal stating: "The text of the statute is clear and unambiguous. It simply does not condition transactional immunity on *truthful* testimony." (emphasis original) *Id.* at 154

In like manner, the Legislature in this case did not condition scoring of the victim's injury in MCL 777.33(2)(b) to injury "short of death".

[52] *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003) *lv den* ___Mich___; 679 NW2d 59 (2004)

[53] *McIntire, supra* at 155

it does not necessarily follow that for other homicides, the Legislature intended that no points be scored. If the statute reflects a graduated scale for assessing harm to victims with death assessed the highest number of points and no injury at zero points, homicide cases should not fall at the lowest end of the spectrum.

Furthermore, it would not be reasonable that the Legislature intended that 50 points be scored for OUIL causing death offenses and 0 points for manslaughter when they both are crimes against a person, both have the same penalty, and both fall in the class C sentencing grid. The guidelines for non-homicide offenses should be elevated by 100 points when death results. However, because many crimes against persons other than homicide are scored using the same variables and same sentencing grids, a score for injury to the victim should distinguish homicides from other non-fatal crimes [*i.e.* a homicide class C offense should be distinguished from other non-homicide class C offenses by scoring for the death of the victim].[54]

2. The legislative intent

Even if this Court found that the language of OV 3 is ambiguous, the intent of the Legislature would clearly dictate that physical injury of the victim should be scored in death cases. When a statute is ambiguous, the Court "seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished."[55] The statute should be given the interpretation which more faithfully advances the legislative purpose behind it.[56]

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[54] For example, in the case of *People v Brown, Jr., supra*, without the scoring for OV 3 for the crime of driving while license suspended causing death, defendant's guidelines were five to seventeen months and an intermediate sanction was required absent a departure. *Id.* at n 6

[55] *People v Cook*, 254 Mich App 635, 639; 658 NW2d 184 (2003) citing *Macomb County Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001)

[56] *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996)

a. The Legislative intent to reduce sentencing disparities for similar offenses

Since the goal of the guidelines was to reduce sentencing disparities for similarly-situated offenders, if the death of a victim is not taken into consideration in the guidelines, the sentencing commission would not have accomplished their directive in homicide offenses.[57] Defendants who commit the same conduct could be subject to widely disparate sentences based on departures from the guidelines due to the death of the victim.[58] On the other hand, if the death of the victim, a routinely aggravating factor, were taken into consideration in the guidelines, similar homicide offenders would receive similar sentences rather than disparate departures from the guidelines. The goal of the sentencing guidelines was "to make sentencing more uniform by quantifying offense and offender characteristics on a consistent basis and applying those standards statewide."[59]

b. The Legislative intent to score elements of the crime and aggravating factors.

Defendant claims that because the death of the victim is an element of the offense, the Legislature did not intend that elements should be taken into consideration in the guidelines. Defendant cites for example MCL 777.31(2)(e), MCL 777.38(2)(b), and MCL 777.41(2)(c) in which the courts are instructed not to score certain aggravating factors which are also elements of the crime. However, these examples are exceptions to the ordinary rule. MCL 769.31(d) indicates in pertinent part, "'Offense characteristics' means *the elements of the crime* and aggravating and mitigating factors relating to the offense that the legislature determines are

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[57] MCL 777.39 (OV 9), the only other offense variable where the death of the victim could possibly be scored, only allows scoring for *multiple* victims.

[58] See: *Hauser, supra* and *Stanko, supra* (indicating that because the death of the victim was not taken into consideration in the guidelines, this was a factor the sentencing court could consider when departing from the guidelines) [Attachment B]

[59] Senate Fiscal Agency Bill Analysis, SB 826, October 23, 1998 [Attachment A]

appropriate. . . ." (emphasis supplied)

Defendant is incorrect that the sentencing commission was charged with deciding what factors *beyond the elements of the offense* should be scored. (Defense Brief at 4) The sentencing commission was instructed to reduce sentencing disparities based on factors *other than* offense and offender characteristics.[60] Offense characteristics were and are defined to include both elements of the crime and aggravating/mitigating factors.[61] Therefore, contrary to defendant's contention that the sentencing guidelines are only meant to include the aggravating and mitigating factors which are not elements of the crime, the guidelines are meant to include elements of the crime except if specifically indicated. For example, even though "operating under the influence" is an element of the crime of OUIL causing death, this element is still scored under MCL 777.48(1)(d)(OV 18). Though the amount of controlled substances is an element of many drug offenses, this element is also scored in MCL 777.45(b)-(e)(OV 15). Though death is an element of the offense, this element is still scored in OUIL causing death cases under MCL 777.33(1)(b),(2)(c)(OV 3). Though malice is an element of the sentencing offense of second-degree murder, malice is still scored in MCL 777.36(1)(b) (OV 6).

Defendant also claims that because a specific sentencing grid is used for those convicted of second-degree murder, the grid itself takes into consideration the death of the victim. However, all homicides are not scored in the M-2 sentencing grids. The following homicides for example would not be scored in the M-2 sentencing grid and scoring of 25 points for the death of the victim is needed to distinguish these offenses from other crimes against persons and other Class A-E, & H offenses: MCL 257.601b(3)(Class C), MCL 257.601c(2)(Class C), MCL 257.616a(2)(e)(Class C), MCL 257.617(3)(Class C), MCL 257.904(4)(Class C),

[60] PA 1994, No. 445; MCL 769.33(1)(e)(iv)[repealed by PA 2002, No. 31]
[61] MCL 769.31(d)

257.904(7)(Class E), MCL 287.323(1)(Class C), MCL 408.1035(5)(Class H), MCL 750.49(8)(Class A), MCL 750.49(10)(Class D), MCL 750.81d(4)(Class B), MCL 750.145o(Class E), MCL 750.200j(2)(e)(Class A), MCL 750.236(Class C), MCL 750.237(4) (Class C), MCL 750.321(Class C), MCL 750.324(Class G), MCL 750.327(Class A), MCL 750.328(Class A), MCL 750.329(Class C), MCL 750.394(2)(e)(Class C), MCL 750.411t(2)(c) (Class C), and MCL 750.479(5)(Class B).

For example, negligent homicide, a class G offense, should be distinguished from other non-fatal class G offenses such as unauthorized disclosure of tax information (MCL 257.27(1)(a)), tobacco products tax act violations (MCL 205.428(2)), possession of stolen or counterfeit insurance certificates (MCL 257.329(1)), negligent crippling by a vessel (MCL 324.80172), and felonious driving (257.626c). Felonious driving, negligent crippling by a vessel and negligent homicide are all 2 year offenses, crimes against persons, and fall within class G. Under defendant's interpretation of OV 3, though 25 points could be assessed for the felonious driving and negligent crippling by a vessel offense where the victim did not die, it could not be assessed for negligent homicide where the defendant inflicted more severe injury on the victim.

Furthermore, when developing offense characteristics, the Legislature specifically directed the sentencing commission to take into consideration, "the aggravating. . .factors relating to the offense" considering crimes of violence as more severe.[62] It cannot be disputed that the death of the victim is an aggravating factor. However, with defendant's interpretation of the guidelines, the death of the victim would not be taken into consideration in the guidelines. The death of the victim, however, is an aggravating factor which separates death offenses from all other crimes against a person.

[62] PA 1994 No. 445; MCL 769.33(1)(e)(ii)[repealed by PA 2002, No. 31]; PA 1994 No. 445; MCL 769.31(e)[amended by PA 2002, No. 31]

c. The Legislative intent to score violent offenders higher than other offenders

The Legislature also specifically directed the sentencing commission when developing the statutory guidelines to "consider an offense involving violence against a person as more severe than other offenses".[63] The Michigan Sentencing Commission indicated that this directive by the Legislature was perhaps its most important criteria when formulating the guidelines.[64] It would not be reasonable that the Legislature, when considering the most violent offenses, those which caused death of the victim, wished to be more restrictive in scoring for physical injury. The Legislature, in drafting the statutory guidelines concerning violent offenders, wanted the statutory guidelines to be higher than the judiciary guidelines:

> Many members of the public are concerned by what they perceive as the failure of the criminal justice system to protect them by locking up violent criminals and keeping them locked up. The revolving door impression of the prison system leads many to feel frustrated about the lack of adequate punishment for criminals and the failure of the system to keep dangerous criminals off the streets.[65]

Both the plain language of the statute and Legislative intent underpinning the guidelines support scoring of OV 3 in this case.

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[63] PA 1994, No. 445; MCL 769.33(1)(e)(ii)[repealed by PA 2002, No. 31]

[64] *Report of the Michigan Sentencing Commission, supra* at 2

[65] House Legislative Analyses for HB 5419, May 12, 1998, September 23, 1998 [Attachment A]; Cf: House Legislative Analysis, SB 373, May 25, 2000 [precursor to PA 2000 No. 279](which amended the guidelines pertaining to criminal sexual conduct offenders because defendants in these violent offenses were receiving lower guidelines ranges than under the judicial guidelines.)[Attachment C]

D. The implication from the sentencing grids for first-time offenders as well as the legislative intent to punish habitual offenders more severely than first-time offenders, indicate that when a defendant's habitual offender guidelines are 300 months or higher, the sentencing court also has the alternative of imposing a life sentence without departing from the guidelines.

Standard of Review and Issue Preservation:

At sentencing, defense counsel objected to scoring OV 3 and 14. Because the sentencing judge found that the guidelines were properly scored, the question of whether a life sentence was an alternative in a lower sentencing cell was not addressed.

The Court of Appeals indicated that, even assuming that OV 3 should have been scored at zero points, defendant's sentence was still within the guidelines. Under the legislative guidelines, although MCL 769.34(10) states that a defendant may seek appellate review of guidelines scoring decisions, it also states that the sentence must be affirmed if it is within "the appropriate guidelines sentence range".[66] Here, whatever range is found to be the "appropriate" range, the sentence imposed would fall within it. The sentence should, therefore, be affirmed regardless of the merit of defendant's scoring challenge.

Discussion:

The defendant was convicted of second-degree murder. MCL 750.317 requires imposition of a sentence of life or any term of years. [67] The defendant's sentence was also enhanced due to his prior felony conviction. MCL 769.10(b) mandates a sentence of life or any term of years. In this case, the sentencing court imposed a life sentence.

Without the 25-point scoring for OV 3, the defendant was placed in offense variable level "II". His prior record variable level was "B". If defendant were scored [without the points for OV 3] on the first-offender grid, his guidelines would be 162 to 270 months. This cell does not

[66] See *Babcock*, *supra* at 261; *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003)
[67] MCL 750.317

allow for an option of a life sentence.[68] However, defendant's guidelines are elevated because he had a prior felony conviction. Though the Legislature did not establish sentencing grids for habitual offenders, it instead stated:

> If the offender is being sentenced under section 10, 11, or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable based on the underlying offense. To determine the recommended minimum sentence range, **increase the upper limit of the recommended minimum sentence range determined** under part 6 **for the underlying offense as follows**:
>
> > (1) **If the offender is being sentenced for a second felony, 25%.**
> > (2) If the offender is being sentenced for a third felony, 50%.
> > (3) If the offender is being sentenced for a fourth or subsequent felony, 100%.[69] (emphasis supplied)

To assist practitioners, West Publishers developed sentencing guidelines manuals which included grids for habitual offenders and indicated when, in the publishers' view, it would be appropriate to allow a life sentence. The sentencing manual itself, however, gave the following caveat:

> This sentencing guidelines manual has been prepared as an aid for those who use the guidelines enacted by the Michigan Legislature. The manual is intended to reflect with complete accuracy the substance of the law. However, in the event that the manual fails to comport exactly with the law, remember that the statute is the controlling authority.[70]

With an elevation of 25% as an habitual offender, the upper level of defendant's guidelines would be increased from 270 to 337 months. However, the publishers of the sentencing manual

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[68] MCL 777.61

[69] MCL 777.21(3)

[70] Michigan Sentencing Guidelines Manual (2001 ed., Oct. 2001) The publishers' choices regarding habitual offender grids were not always accurate. For example, though the Legislature gave life as an option for a defendant convicted of second-degree murder in 1999 who fell in the A-III level of the guidelines, the publishers of the sentencing manual did not give life as an option for the same defendant, falling in the same sentencing cell, convicted as an habitual offender. [Attachment D]

did not indicate that they believed that a life sentence was an option for a defendant convicted of second-degree murder as an habitual offender with these guidelines.

MURDER 2ND DEGREE

PRV LEVEL

	A 0 Points		B 1 - 9 Points		C 10 - 24 Points		D 25 - 49 Points		E 50 - 74 Points		F 75+ Points		
I 0 - 49 Points	90	187 225 300	144	300 360 480	162	337 405 540	180	375/L 450/L 600/L	225	468/L 562/L 750/L	270	562/L 675/L 900/L	HO2 HO3 HO4
II 50 - 99 Points	144	300 360 480	162	337 405 540	180	375/L 450/L 600/L	225	468/L 562/L 750/L	270	562/L 675/L 900/L	315	656/L 787/L 1050/L	HO2 HO3 HO4
III 100+ Points	162	337/L 405/L 540/L	180	375/L 450/L 600/L	225	468/L 562/L 750/L	270	562/L 675/L 900/L	315	656/L 787/L 1050/L	365	750/L 900/L 1200/L	HO2 HO3 HO4

The Court of Appeals in this case disagreed with the publishers of the sentencing manual regarding when a life sentence could be imposed. The Court of Appeals held:

> [T]he Legislature has not provided separate grids in situations where the habitual offender act applies. Rather, the Legislature has only directed that the upper level of the appropriate recommended minimum sentence range for an indeterminate sentence be increased in proportion to whether the convicted offender has one (twenty-five percent), two (fifty percent), or three (one hundred percent) prior felony or attempted felony convictions. MCL 777.21(3) Nevertheless, the Legislature has provided clear guidance regarding when it is appropriate to impose a life sentence within the guidelines range. Without adjustment under MCR 777.21(3), each of the possible sentence guidelines loci (twelve of eighteen) where the upper range of the recommended minimum sentence is three hundred months or more permits a life sentence as an alternative sentence. MCL 777.61. We conclude that whether a life sentence is within the guidelines is therefore a function of the upper limit of the recommended minimum sentence range for an indeterminate sentence. Where the upper range is three hundred months (twenty-five years) or more, a life sentence is an appropriate alternative sentence within the guidelines recommendation.
>
> This view is buttressed by the fact that only one of the six loci in the M-2 grid, III-A (162-270 months) recommends an alternative life sentence where the upper

limit of the recommended minimum sentence range is less than three hundred months. MCL 777.61 Similarly, the sentence guidelines grid for class "A" offenses has life as a recommended alternative sentence only where the upper limit of the recommended minimum sentence range is at least three hundred months.[71]

MURDER 2ND DEGREE

PRV LEVEL

OV LEVEL	A 0 Points	B 1 - 9 Points	C 10 - 24 Points	D 25 - 49 Points	E 50 - 74 Points	F 75+ Points
I 0 - 49 Points	90 - 150	144-240	162-270	180-300 or Life	225-375 or Life	270 - 450 or Life
II 50 - 99 Points	144-240	162-270	180-300 or Life	225-375 or Life	270 - 450 Life	315 - 525 or Life
III 100+ Points	162-270 or Life	180-300 or Life	225-375 or Life	270 - 450 or Life	315 - 525 or Life	365 - 600 or Life

[71] *Houston, supra* at 475

CLASS A OFFENSES

PRV LEVEL

OV LEVEL	A 0 Points	B 1 - 9 Points	C 10 - 24 Points	D 25 - 49 Points	E 50 - 74 Points	F 75+ Points
I 0-19 Points	21 - 35	27 - 45	42 - 70	51 - 85	81 - 135	108 - 180
II 20 - 39 Points	27 - 45	42 - 70	51 - 85	81 - 135	108 - 180	126 - 210
III 40 - 59 Points	42 - 70	51 - 85	81 - 135	108 - 180	126 - 210	135 - 225
IV 60 - 79 Points	51 - 85	81 - 135	108 - 180	126 - 210	135 - 225	171 - 285
V 80 - 99 Points	81 - 135	108 - 180	126 - 210	135 - 225	171 - 285	225 - 375 or Life
VI 100+ Points	108 - 180	126 - 210	135 - 225	171 - 285	225 - 375 or Life	270 - 450 or Life

The Legislature did not articulate in MCL 777.21 whether an increase of the "upper limit" only included an increase in the number of months or if it included an increase in the availability of a life sentence. Statutory language is clear and unambiguous only when reasonable minds could not differ with regard to its meaning.[72] Though a court cannot make new law when the Legislature is silent, it can engage in statutory construction when a term is not specifically

[72] *In Re MCI*, 460 Mich 396, 411; 597 NW2d 164 (1999)

defined or when all implications from the statute have not been articulated.[73] Justice Scalia in his book, *A Matter of Interpretation* (Princeton, New Jersey: Princeton University Press) p 147 indicated that it is not inconsistent with textualism to interpret statutes as leaving some of the uncertainties to be worked out in practice and litigation. For example, when it was unclear whether the scope of the term "penalty" mentioned in the conspiracy statute included imposition of consecutive sentences as well as imposition of a sentence equivalent to the underlying offense for individuals convicted of conspiracy to commit certain drug offenses, this Court looked to legislative purpose.[74]

Because the Legislature did not clearly indicate the perimeters of an increase in upper limit, the Court of Appeals' inference from the existing grids was reasonable. The sentencing court has an option of a life sentence for a defendant with at least a 300 month scoring in all circumstances in the M-2 and Class A sentencing grids for first felony offenders. The defendant's guidelines went up to 337 months. A sentence of life is not invariably a greater penalty than a sentence of a term of years.[75] If a life sentence is imposed, a defendant convicted after 1992 is eligible for parole after 15 years[[76]] and it is not unreasonable that defendants with guidelines allowing for a twenty-five year minimum would also be subject to imposition of a life sentence.

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[73] For example, if there is no legislative definition of a term and the courts define it, this situation does not constitute a circumstance in which the courts are reading nonexisting words into a statute. *Cathey, supra* citing *Clackamas Gastroenterology Associates P.C. v Wells*, 538 US 440, 447-448; 128 S Ct 1673; 155 L Ed 2d 615 (2003)

[74] *People v Denio*, 454 Mich 691, 702, 703-704; 564 NW2d 13 (1999) In *Denio* at issue was the statute, MCL 750.157a which mandates that a person convicted of conspiracy "shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit. . ."

[75] *People v Carson,* 220 Mich App 662, 673; 560 NW2d 657 (1996) *lv den* 456 Mich 906; 572 NW2d 14 (1997) *reconsideration den* 456 Mich 906; 575 NW2d 556 (1998); *Merriweather, supra* at 809-811

[76] *Carson, supra* at 676; MCL 791.234(6)

It would not be reasonable that a court would be precluded from imposing a life sentence for an habitual offender with guidelines of 162 to 337 when the court would have an option of a life sentence for individuals with lower guidelines scoring of 162-270 or 180-300 months as first offenders. Even "[a] statute that is unambiguous on its face can be rendered ambiguous by its interaction with and its relation to other statutes."[77] The Court "seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished."[78] Because the Legislature has established grids for first offenders, presumably none of the defendants who fall within the first offender grids have prior felonies. The Legislature has intended "more serious commissions of a given crime *by persons with a history of criminal behavior* to receive harsher sentences than relatively less serious breaches of the same penal code by first-time offenders."[79] (emphasis supplied) Also the "premises of our system of criminal justice is that, everything else being equal, the more egregious the offense *and the more recidivist the criminal the greater the punishment*."[80] (emphasis supplied)

One of the tasks of the sentencing commission in arriving at proportionate sentences was specifically to take into consideration the offender's prior record.[81] As stated in the legislative history of the statutory sentencing guidelines, "The sentencing structure reflects a philosophy of ensuring that violent *and repeat offenders* are to be treated more harshly than other offenders.

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[77] *People v Valentin*, 457 Mich 1, 6; 577 NW2d 73 (1998) citing *Denio, supra* at 699
[78] *Cook, supra* citing *Macomb County Prosecutor, supra*
[79] *Milbourn, supra* at 635; *Babcock, supra* at 254
[80] *Babcock, supra* at 263
[81] PA 1994, No. 445; MCL 769.33(1)(e)(iii)[repealed by PA 2002, No. 31]

.Strong habitual offender enhancements are necessary to properly punish and incapacitate career criminals." (emphasis supplied)[82]

Because the Legislature has not indicated whether the 25% increase includes only an increase in months or also an increase in the availability of a life sentence, considering the intent of the sentencing guidelines and the harm they seek to remedy, the lower court's interpretation of the circumstances which trigger the alternative of a life sentence best accomplishes the statute's purpose.[83]

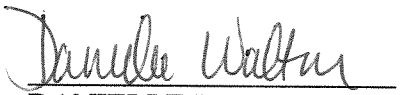
[82] House Legislative Analysis, HB 5419, May 12, 1998, September 23, 1998; Senate Fiscal Agency Bill Analysis, SB 826, October 23, 1998 [Attachment A]
[83] *Adair, supra*

RELIEF

WHEREFORE, the Prosecuting Attorneys Association respectfully requests that this Honorable Court affirm the Court of Appeals' decision for the reason that OV 3 was properly scored.

Respectfully submitted,

DAVID GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

BY: 
DANIELLE WALTON (P52042)
Assistant Prosecuting Attorney

DATED: February 23, 2005

ATTACHMENT A

1990 5419 5421

House Legislative Analysis Section

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SENTENCING GUIDELINES/ TRUTH IN SENTENCING

House Bill 5419 (Substitute H-4)
Sponsor: Rep. James McNutt

~~House Bill 5421~~ (Substitute H-4)
Sponsor: Rep. Michael Nye

Committee: Judiciary

~~House Bill 5398~~ (Substitute H-4)
Sponsor: Rep. A.T. Frank
Committee: Corrections

~~Senate Bill 826~~ (Substitute H-3)
Sponsor: Sen. William Van Regenmorter
Senate Committee: Judiciary
House Committee: Judiciary

First Analysis (5-12-98)

House Bills 5419, ~~5421, 5398~~ and Senate ~~Bill 826~~ (5-12-98)

THE APPARENT PROBLEM:

Many members of the public are concerned by what they perceive as the failure of the criminal justice system to protect them by locking up violent criminals and keeping them locked up. The revolving door impression of the prison system leads many to feel frustrated about the lack of adequate punishment for criminals and the failure of the system to keep dangerous criminals off the streets. All too frequently, a criminal who has been sentenced to prison is released even before the end of his or her minimum term of imprisonment and then commits yet another crime. Anecdotes abound of lives lost or ruined by acts committed by violent criminals who would have still been behind bars if they had been kept locked up until the expiration of their minimum terms. People are and have been outraged by this all too common occurrence.

The answer, say many, is "truth in sentencing," a concept under which offenders would have to serve their minimum sentences. In 1994, legislation (Public Acts 217 and 218) was enacted to provide for "truth in sentencing." The effective date of the 1994 truth-in-sentencing legislation, however, was tied to the enactment of statutory sentencing guidelines, after the Sentencing Guidelines Commission submitted its report to the legislature. Under the truth-in-sentencing legislation, most prisoners would have to serve at least their judicially imposed minimum sentence. Some people believe that the truth-in-sentencing concept should now be made effective and that the concept should be extended to apply to all prisoners, rather than just those who are convicted of specific offenses.

On the other hand, many people are equally concerned with the failure of indeterminate sentencing to provide an evenhanded standard of punishment for crimes. (For a brief explanation of sentencing in Michigan, see Background Information.) Many believe that indeterminate sentencing systems have contributed to sentencing disparities where two offenders who commit very nearly the same crime and who have similar criminal histories may be sentenced to widely differing minimum terms. In 1979, the Michigan Supreme Court, apparently out of concerns regarding disparity in the imposition of criminal sentences throughout the state, appointed an advisory committee to research and design a sentencing guidelines system. In 1983, the guidelines were distributed to circuit court and Recorder's Court judges, for use on a voluntary basis. The following year, the supreme court mandated statewide use of the guidelines and began collecting data to test the guidelines' validity and effectiveness. Michigan's criminal justice system has operated under these judicially-imposed sentencing guidelines since 1984.

A revised version of the judicial guidelines has been in effect since October 1, 1988, pursuant to a Supreme Court Administrative Order. No modifications or amendments have been made to the currently used sentencing guidelines since that date. These guidelines were designed to reduce disparity in sentencing from county to county and region to region by mirroring the existing sentencing practices of judges across the state at the time the guidelines were implemented. They were developed using the results of research on sentencing patterns of judges throughout Michigan, and attempt to capture the typical sentence for similar types of offenses and offenders. In designing the current system, the guidelines' impact on state and local correctional resources and budgets were not considered.

The supreme court's guidelines have been criticized on a number of grounds. For one thing, the guidelines essentially codified existing practices by reflecting the average sentences imposed for similar crimes and similar defendants rather than looking at what a reasonable sentence was for the particular crime. In addition, the current guidelines have been criticized both for excessive leniency and for undue harshness. As the state's prison overcrowding has worsened despite an expensive prison construction program, many have concluded that a comprehensive review and development of sentencing guidelines by the legislature (as it is the legislature that establishes the penalties for various offenses) was needed to ensure that limited prison and jail space were put to best use.

During the time that the judicially mandated sentencing guidelines have been in use, several bills were introduced in the legislature calling for an independent commission to develop a systematic statutory sentencing structure. Finally, in 1994, Public Act 445 provided for the selection of a 19-member Sentencing Guidelines Commission and charged it with designing and recommending to the legislature a new sentencing guidelines system.

The commission began its work in May of 1995, with the goal of developing sentencing guidelines that would provide for the protection of the public, that considered offenses involving violence against a person as more severe than other offenses, and that were proportionate to the seriousness of the offense and the offender's prior criminal record. In addition, the commission was instructed to take into account the capacity of state and local correctional facilities.

On October 22, 1997 the commission adopted its recommendations for a set of sentencing guidelines on a 12-3 vote and submitted them to the legislature for its approval. According to the law that established the commission, the commission's guidelines will not take effect unless they are enacted into law. Some people believe that the legislature should adopt a system of sentencing guidelines based on that report.

THE CONTENT OF THE BILLS:

The package of bills would enact sentencing guidelines and truth in sentencing. House Bill 5419, Senate Bill 826, and House Bill 5398 would amend, respectively, the Code of Criminal Procedure, the prison code, and the Department of Corrections (DOC) act to establish statutory sentencing guidelines and to modify and give effect to the provisions enacted in 1994 and commonly referred to as "truth-in-sentencing." House Bill 5419 would enact the sentencing guidelines. House Bill 5421 and Senate Bill 826 are identical and with House Bill 5398 would provide for modifications and implementation of truth in sentencing.

The bills would take effect on January 1, 1999. None of the bills would take effect unless each of the bills (not including House Bill 5421) are enacted and all of the following bills are also enacted:

-- House Bill 4065 (which, as passed by the House, would amend the Public Health Code to make drug-aided criminal sexual conduct and the attempt thereof a felony, add two substances to the code's schedule of controlled substances, and repeal the section of the health code mandating life imprisonment for Schedule 1 narcotics [such as heroin] or cocaine [a Schedule 2 drug] offenses involving at least 650 grams [23 ounces] and instead require imprisonment for life or any term of years, but not less than 20 years.) The bill is currently in the Senate Judiciary Committee. (As previously considered by the Senate Committee on Health Policy and Senior Citizens, the provisions regarding the 650 grams-lifer law were removed.)

-- House Bills 4444-4446 (which would revise penalties for larceny offenses and increase civil penalties for retail fraud). These bills have passed the House and are currently in the Senate Judiciary Committee.

-- House Bill 4515 (which would amend the Department of Corrections act [Public Act 232 of 1953], to make a high school diploma or a general education development [G.E.D.] certificate a condition

of parole for a prisoner serving a minimum term of at least two years). This bill has passed the House and is currently in the Senate Judiciary Committee.

-- An as yet unintroduced bill (request number 06332'98 -- which would, according to House Democratic staff, amend correction ombudsman language).

House Bill 5419 would establish in statute most of the recommendations of the Michigan Sentencing Commission, although the bill includes a number of crimes that were not in the commission's recommendations, specifies lower sentence ranges in many cases, and includes some factors as prior record variables that the commission's recommendations did not include.

The bill would add Chapter XVII to the Code of Criminal Procedure (MCL 769.8 et al.) to do all of the following:

--Classify over 700 criminal offenses into nine crime classes and six categories.

--Provide for the classification of some attempted crimes.

--Include instructions for scoring sentencing guidelines, including the application of 19 different offense variables and seven different prior record variables.

--Outline sentencing grids, with various recommended minimum sentence ranges, for each of the nine crime classifications.

--Require that, if a statute mandated a minimum sentence, the court impose the sentence in accordance with that statute.

--Set the longest allowable minimum sentence at two-thirds of the statutory maximum sentence (which would codify the "Tanner Rule").

--Provide for intermediate sanctions when a person's recommended minimum sentence range did not exceed 18 months.

--Allow a court to forego sentencing guidelines scoring for some departures from the appropriate sentence range.

--Provide for the Sentencing Commission to make recommended modifications to the sentencing guidelines.

Crime Classification. Under the bill, over 700 crimes in the Michigan Compiled Laws are divided into six categories: crimes against a person; crimes against property; crimes involving a controlled substance; crimes against public order; crimes against public trust; and crimes against public safety. The bill specifies, however, that the offense descriptions would be for assistance only, and that the listed statutes would govern the application of the sentencing guidelines. Within these categories, the crimes are then classified in nine different classes of descending severity. According to the Sentencing Commission's report, Class M2 is a separate classification for the offense of second-degree murder; and Classes A through H include crimes for which the following maximum sentences may be appropriate:

Class	Sentence
A	Life imprisonment
B	20 years' imprisonment
C	15 years' imprisonment
D	10 years' imprisonment
E	5 years' imprisonment
F	4 years' imprisonment
G	2 years' imprisonment
H	Jail or other intermediate sanctions

Attempted Crimes. The bill's sentencing guidelines would apply to an attempt to commit an offense listed in Chapter XVII only if the attempted violation were a felony. The sentencing guidelines structure would not apply, however, to an attempt to commit a Class H offense.

For an attempted offense listed in Chapter XVII, the offense category (e.g., crime against a person) would be the same as the attempted offense. An attempt to commit an offense listed in Chapter XVII would be classified as follows:

- Class E, if the attempted offense were in Class A, B, C, or D.
- Class H, if the attempted offense were in Class E, F, or G.

General Scoring. The bill includes instructions for scoring sentencing guidelines. For an offense listed in Chapter XVII, a judge would determine the recommended minimum sentence range by first finding the offense category for the offense. From the

variables spelled out in the bill, the judge then would determine the offense variables to be scored for that offense category and score and total only those offense variables. The judge also would have to score and total all prior record variables for the offense, as provided in the bill. Then, using the offense class, the judge would find the intersection of the offender's offense variable level and prior record variable level on the sentencing grid included in the bill to determine the recommended minimum sentence range. The bill shows the recommended minimum sentence within a sentencing grid as a range of months or life imprisonment.

Multiple Offense Scoring. If the defendant were convicted of multiple offenses, the applicable offense variables for each offense would have to be scored.

Attempted Offense scoring. If an offender were being sentenced for an attempted felony included in the sentencing guidelines structure, the judge would have to determine the offense variable level and prior record variable level based on the underlying attempted offense.

Habitual Offender scoring. If the offender were being sentenced under the Code of Criminal Procedure's habitual offender provisions, the judge would have to determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, the upper limit of the range determined under the bill's grid would have to be increased as follows:

-- By 25 percent, if the offender were being sentenced for a second felony.
-- By 50 percent, if the offender were being sentenced for a third felony.
-- By 100 percent, if the offender were being sentenced for a fourth or subsequent felony.

Crime Categories. For all crimes against a person, offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 19 would have to be scored. Offense variables 5 and 6 would have to be scored for homicide or attempted homicide. Offense variable 16 would have to be scored for a home invasion offense. Offense variables 17 and 18 would have to be scored if an element of the offense or attempted offense involved the operation of a vehicle, vessel, aircraft, or locomotive.

For all crimes against property, offense variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored.

For all crimes involving a controlled substance, offense variables 1, 2, 3, 12, 13, 14, 15, and 19 would have to be scored.

For all crimes against public order and all crimes against public trust, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored.

For all crimes against public safety, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored. If an element of the offense involved the operation of a vehicle, vessel, aircraft, or locomotive, offense variable 18 would have to be scored.

Offense Variables. The bill identifies each of the 19 offense variables and would assign various points to be scored depending on whether and how the offense variable applied to the particular violation.

Offense variable 1 would be aggravated use of a weapon; offense variable 2 would be lethal potential of the weapon used; offense variable 3 would be physical injury to a victim; offense variable 4 would be psychological injury to a victim; and offense variable 5 would be psychological injury to a member of a victim's family.

Offense variable 6 would be the offender's intent to kill or injure another individual; offense variable 7 would be aggravated physical abuse; offense variable 8 would be asportation or captivity; offense variable 9 would be the number of victims; and offense variable 10 would be exploitation of a vulnerable victim.

Offense variable 11 would be criminal sexual penetration; offense variable 12 would be contemporaneous felonious criminal acts; offense variable 13 would be continuing the pattern of criminal behavior; offense variable 14 would be the offender's role; and offense variable 15 would be aggravated controlled substance offenses.

Offense variable 16 would be property obtained, damaged, lost, or destroyed; offense variable 17 would be degree of negligence exhibited; offense variable 18 would be operator ability affected by alcohol or abuse; and offense variable 19 would be a threat to the security of a penal institution or court, or interference with the administration of justice.

Prior Record Variables. The bill identifies seven prior record variables and would assign various points to be scored depending on whether and how the prior record variable applied to the particular violation.

Prior record variable 1 would be "prior high severity felony convictions," which would mean a conviction for a crime listed in offense class M2, A, B, C, or D. Prior record variable 2 would be "prior low severity felony convictions," which would mean a conviction for a crime listed in offense class E, F, G, or H.

Prior record variable 3 would be "prior high severity juvenile adjudications," which would mean a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D, if committed by an adult. Prior record variable 4 would be "prior low severity juvenile adjudications," which would mean a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H, if committed by an adult.

Prior record variable 5 would be prior misdemeanor convictions, prior misdemeanor juvenile adjudications, or parole or probation violations; prior record variable 6 would be relationship to the criminal justice system; and prior record variable 7 would be subsequent or concurrent felony convictions.

In scoring prior record variables 1 through 5, a conviction or juvenile adjudication could not be used if it preceded a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

Sentencing Grids. The bill specifies a grid of minimum sentencing ranges for each class of offenses (M2 and A through H). The appropriate minimum sentencing range would be determined by scoring the offense variable point level on one axis of the grid and the prior record variable point level on the other axis, then finding the intersecting cell of the grid.

For each offense class, the bill specifies the lowest minimum sentence cell range and the highest minimum sentence cell range, as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M	286-143	347-570, or life
A	18-33	230-428, or life
B	0-17	99-152
C	0-11	66-114
D	0-6	46-76
E	0-3	26-38
F	0-3	18-30
G	0-3	8-23
H	0-1	5-17

[Note: These are lower in many instances than those recommended by the commission. The commission recommendations are as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M	290-150	365-600, or life
A	21-35	270-450, or life
B	0-18	117-160
C	0-12	78-120
D	0-6	54-80
E	0-3	30-40
F	0-3	21-32
G	0-3	9-24
H	0-1	6-18

Presentence Reports. A probation officer who was required to provide the court with a presentence investigation could have his or her name removed from the report by request to the court, if the report had been amended or altered prior to sentencing by the officer's supervisor or by any other person with authority to amend or alter a presentence investigation report.

Mandatory Minimums. The bill specifies that if a statute mandated a minimum sentence, the court would have to impose a sentence in accordance with that statute. Imposing a statutory mandatory minimum sentence would not be considered a departure from the sentencing guidelines' minimum sentence range.

"Tanner Rule." The bill would prohibit a court from imposing a minimum sentence, including a departure from the sentencing guidelines' minimum sentence range, that exceeded two-thirds of the statutory maximum sentence. (This would codify the "Tanner Rule," established by case law, which sets two-thirds of a maximum sentence as the longest minimum sentence allowed in Michigan's indeterminate sentencing system.)

Intermediate Sanctions. If the upper limit of the recommended minimum sentence range under the sentencing guidelines was 18 months or less, the court would have to impose an intermediate sanction unless the court stated on the record a substantial and

compelling reason to sentence the individual to the jurisdiction of the Department of Corrections. Under the bill, an intermediate sanction could include a jail term that did not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever was less. (The code currently defines "intermediate sanction" as probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed; including, for example, drug treatment, mental health treatment, jail, community service, or electronic monitoring.)

Absent a departure from sentencing guidelines' minimum sentence range, if the upper limit of the sentencing guidelines' recommended minimum sentence exceeded 18 months and the lower limit of the minimum sentence range was 12 months or less, the court would have to sentence the offender to either imprisonment with a minimum term within that range, or an intermediate sanction that included a term of imprisonment of not less than the minimum range or more than 12 months.

The court would have to impose a sentence of life probation, absent a departure from the sentencing guidelines' minimum sentence range, for manufacturing, delivering, possessing with intent to deliver, or possessing a mixture that contained less than 50 grams of a Schedule 1 or 2 narcotic or cocaine where the upper limit of the recommended minimum sentence range was 18 months or less.

In addition, if an attempt to commit a Class H felony were punishable by imprisonment for more than one year, the court would have to impose an intermediate sanction upon conviction of that offense, absent a departure from the sentencing guidelines' minimum sentence range.

Finally, if a court imposed a sentence of imprisonment in a county jail under the guidelines, the bill would require the state to reimburse the county for the cost of housing that individual in the county jail. The criteria for and the rate of reimbursement would be required to be established in the appropriations act for the Department of Corrections.

Departures. The code specifies that a court may depart from the appropriate sentence range established under statutory sentencing guidelines if the court has a substantial and compelling reason and states on the record the reasons for departure. The court may not base a departure on an offense characteristic or offender characteristic already considered in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic was given inadequate or disproportionate weight.

Sentencing Commission. The bill would revise provisions of the code that created the Michigan Sentencing Commission and specified its responsibilities. The commission would be charged with developing recommended modifications to the sentencing guidelines, rather than developing the recommended guidelines themselves. Modifications to the enacted guidelines could be recommended no sooner than January 1, 2001, unless based on omissions, technical errors, changes in law or court decisions.

The bill also would delete the code's schedules for the commission to develop and submit recommended sentencing guidelines, to submit revised guidelines if the legislature failed to enact the recommended guidelines within a specified period, and to submit subsequent modifications to enacted guidelines. The commission would have to submit recommended modifications to the Secretary of the Senate and the Clerk of the House of Representatives. If the legislature failed to enact the modifications within 60 days after introduction of a bill to enact them, the commission would have to revise the recommended modifications and resubmit them to the secretary and the clerk within 90 days. Until the legislature enacted modifications, the sentencing commission would have to continue to revise and resubmit the modifications under this schedule.

Enhancements. The bill would prohibit the use of a conviction to enhance a sentence where the conviction had been used to enhance a sentence under a statute that prohibited the use of the conviction for further enhancement. This would comport with the provisions of House Bills 4444-4446.

Disciplinary time. The bill would also eliminate references to disciplinary time as necessitated by the changes in the truth in sentencing bills.

Senate Bill 826 and House Bill 5421 are identical. The bills would amend the prison code (MCL 800.34 and 800.35) to provide for the parole board to receive and consider a prisoner's disciplinary time in making its decision to parole that prisoner.

Currently, the prison code includes provisions for the addition of disciplinary time to the minimum sentence

of a "prisoner subject to disciplinary time" for each major misconduct for which he or she is found guilty. Accumulated disciplinary time is to be added to a prisoner's minimum sentence in order to determine his or her parole eligibility date. "Prisoner subject to disciplinary time" means a prisoner sentenced on or after the effective date of the disciplinary time provision to an indeterminate term of imprisonment for specified offenses. (The disciplinary time provisions were part of the 1994 "truth-in-sentencing" legislation, but the effective date of the provisions was delayed until sentencing guidelines are enacted into law after the sentencing commission submits recommended guidelines.)

Instead of requiring that disciplinary time be added to a prisoner's minimum sentence, the bill would require instead that a prisoner's accumulated disciplinary time be submitted to the parole board for consideration at the prisoner's parole review or interview.. In addition, the Department of Corrections would be required to promulgate rules setting the amount of disciplinary time that would be submitted to the parole board for each type of major misconduct.

The bill would also change the definition of a "prisoner subject to disciplinary time" so that the provisions would apply to both of the following:

-- A prisoner who was sentenced to an indeterminate term for any of the specified offenses, if the crime were committed on or after January 1, 1999 (the effective date of the sentencing guidelines proposed by House Bill 5419).

-- A prisoner who was sentenced to an indeterminate term for any other crime, if that crime were committed on or after January 1, 2000.

Finally, the bill would also repeal the sections of the "truth-in-sentencing" legislation (Public Acts 217 and 218 of 1994) that delay the effective date of those provisions until the enactment of sentencing guidelines after the sentencing commission submits recommended guidelines.

House Bill 5398 would amend the Department of Corrections act (MCL 791.233 et al.) to require that a statement of a prisoner's disciplinary time be submitted to the parole board and to remove provisions that would have allowed for disciplinary time to be added to a prisoner's minimum term for parole eligibility. However, the bill would also allow for disciplinary time to be added to a prisoner's minimum sentence when determining when the prisoner would be eligible for "extension of the limits of confinement" (this could include release to visit a critically ill relative, attend a relative's funeral, to contact prospective employers, or to receive medical treatment not otherwise available to the prisoner for those confined in a state correctional facility, or placement in a community residential home or a community corrections center, and work, or participation in an education, training, or drug treatment program.). (Note: "Community corrections center" means a facility either contracted for or operated by the Department of Corrections in which a security staff is on duty seven days per week and 24 hours per day. "Community residential home" means a location where electronic monitoring of prisoner presence is provided by the Department of Corrections seven days per week and 24 hours per day, except that the department may waive the requirement that electronic monitoring be provided as to any prisoner who is within three months of his or her parole date.)

For those prisoners who could be eligible for an extension of the limits of confinement, most would not be eligible until they had served their minimum sentence plus any disciplinary time. However, a prisoner who was serving a sentence for a class E, F, G, or H offense under the sentencing guidelines proposed by House Bill 5419 or an attempt of such a crime would be eligible for placement in a community corrections center when he or she had less than 180 days remaining on his or her minimum sentence plus any disciplinary time. Such a prisoner could not be placed in a community residential home, and if placed in a community corrections center he or she would be required to be placed on electronic monitoring whether inside or outside the center. Prisoners who were serving sentences for criminal sexual conduct offenses, had been determined by the department to present a risk to the public safety, or had been classified by the department's risk screening criteria as a very high assault risk would be barred from placement in a community corrections center.

In addition, the bill would require the governing bodies of the Senate and House Fiscal Agencies to have access to all Department of Corrections records that relate to individuals under the department's supervision. This would include, but not be limited to, records contained in basic information reports, the corrections management information system, the parole board information system, and any successor databases. However, access to these records would not be allowed if the department determined that

access was restricted or prohibited by law, or could jeopardize an ongoing investigation, the safety of a prisoner, employee or other person, or the safety, custody or security of an institution or other facility. The governing board of the Senate Fiscal Agency, the governing committee of the House Fiscal Agency, and the DOC would enter a written agreement to establish which records would be accessed and the manner of access and to ensure the confidentiality of the accessed records.

The provisions regarding notice and proceedings for parole interviews by a parole board member for prisoners under a life sentence (except those sentenced for first degree murder or for a major controlled substance offense) would also be amended so that notice and proceedings would be provided in the same fashion for those prisoners as it is currently required for other prisoners.

Finally, the bill would change references to the "probate court" concerning mental health commitments and persons requiring treatment to "appropriate court" since the family division of the circuit court may have ancillary jurisdiction.

BACKGROUND INFORMATION:

Criminals in Michigan are sentenced under an indeterminate sentencing structure, meaning, basically, that the sentencing judge sets minimum and maximum terms to be served. The maximum term is limited to the maximum set by statute, while, typically, the minimum term is chosen from a range suggested by the use of supreme court sentencing guidelines, which weight various factors regarding the facts of the case and the criminal history of the offender; a judge may depart from guidelines, however, and order a minimum term greater or lesser than those suggested by guidelines, but must state his or her reasons on the record. Case law determines what constitutes acceptable reasons for departing from guidelines. In any event, under a controlling 1972 opinion of the Michigan Supreme Court, the minimum sentence cannot be more than two-thirds the maximum established by statute (People v. Tanner, 387 Mich 683).

The exact duration of the sentence served is not established at the time of sentencing; thus, sentencing is "indeterminate." The actual time that an offender serves in prison or some other correctional facility is a function of the minimum sentence and several other factors. Under Michigan statute, a minimum sentence may be reduced by the accumulation of "disciplinary credits" awarded by the Department of Corrections to prisoners. A prisoner is eligible to earn a disciplinary credit of five days per month for each month served without a major misconduct violation, plus an additional two days per month of "special disciplinary credits" awarded for good institutional conduct. A prisoner is eligible for parole upon serving his or her minimum sentence less any accumulated disciplinary credits. (While this explanation describes the disciplinary credit system for new prison intakes, it should be noted that offenders currently within the jurisdiction of the corrections system may be subject to alternate calculations of "good time" [which was eliminated by Proposal B of 1978 for certain serious offenders], or some combination of good time and disciplinary credits.)

A prisoner becomes eligible for parole upon completing his or her minimum sentence, minus any reductions for good time or disciplinary credits. Prior to parole, a prisoner may be placed in a community corrections facility; by law, however, assaultive offenders may not receive community placement prior to 180 days before the expiration of their minimum terms.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The current, judicially established, sentencing guidelines are inadequate and need to be replaced. The legislature recognized this in 1994 when it passed Public Act 445, which created the Michigan Sentencing Commission and charged it with developing recommendations for a comprehensive statutory sentencing guidelines structure. The judicial guidelines reportedly incorporate only about 100 offenses, and are designed to be reflective of past sentencing practices, rather than providing a considered statement of public policy regarding criminal sentencing.

By enacting the system recommended in the bill, the legislature will be making a clear and rational declaration of public policy on the issues of crime and punishment, rather than passively accepting a working average emerging out of judicial practice. A rational and comprehensive system of sentencing guidelines will ensure that justice is served, bias is removed from

decision-making, and limited prison and jail resources are used to their best advantage--that is, to house the worst offenders.

The classification and grid system proposed in the bill was created by a commission of experts, supported by a professional staff and operating with clear statutory objectives. This sentencing structure reflects a philosophy of ensuring that violent and repeat offenders are to be treated more harshly than other offenders. Further, in the guidelines, crimes against people are punished more severely than property crimes and many nonviolent crimes are punished with shorter sentences or no prison time. Sentencing practices, then, would be more proportionate to both the seriousness of the offense and the offender's prior criminal record.

For:

While there has in the past been some concern over whether sentencing guidelines are within the proper purview of the legislature, any lingering doubts have been answered by the discussion in the supreme court's decision in People v Milbourn (461 N.W.2d 1, 435 Mich. 630): the court expressed reluctance to require strict adherence to guidelines because the court's guidelines did not have a legislative mandate. The court also noted that departures would be appropriate where guidelines did not adequately account for important factors legitimately considered at sentencing, and that to require strict adherence would effectively prevent their evolution. Many feel that the decision eliminated, for practical purposes, the effectiveness and enforceability of the current guidelines. As a result, legislatively enacted sentencing guidelines are even more urgently needed to provide enforceable restraint on the exercise of judicial discretion. Without effective guidelines disparities in sentencing based on race, ethnicity, local attitudes, and the biases of individual judges will become commonplace.

Against:

The bill could unduly interfere with the discretion of the judicial branch to deal with individual circumstances. Although departures from sentencing guidelines would be allowed, they would be limited to cases that presented "substantial and compelling" reasons. Generally, to the extent that the bill limited judicial discretion, it would place sentencing power in the hands of prosecutors through the exercise of prosecutorial discretion over how offenders are charged. Sentencing decisions are best left where they belong, in the hands of impartial judges.

Response:

The unrestrained exercise of judicial discretion can lead to sentencing practices that vary from county to county and court to court, opening avenues for personal bias or philosophical differences to influence sentencing decisions. Sentencing guidelines are supposed to remove bias and make sentencing more uniform by quantifying offense and offender characteristics. The guidelines offer adequate provision for individual circumstances by allowing guidelines to be set aside for "substantial and compelling" reasons, subject to review by appellate courts.

Against:

The bill would require the use of "intermediate sanctions," including jail and nonincarcerative sanctions, for offenders with guidelines minimums of less than 18 months; the proposal suggests that more felons will have to be dealt with locally. Without adequate funding and support from the state, the bill could exacerbate problems for already overburdened jails and alternative programs.

Response:

Provision has been made for state reimbursement to counties for the costs of housing individuals in county jails. The amount and criteria for this reimbursement will be established in the Department of Corrections appropriations act.

Against:

The legislation should do more to curb inappropriate sentences that would result from applying the same factors more than once. Because guidelines themselves take criminal history into account, the justice of applying habitual offender sentence enhancements on top of this is debatable. The bill would provide for the sentences of second, third, and fourth repeat offenders to be lengthened by 25, 50, and 100 percent, respectively. This would be in addition to the fact that the habitual offender grid would expand the minimum range for the crime based on prior record. To make matters worse, the decision as to whether the prior record would be counted twice is left to the prosecutor who decides whether to charge the individual as a habitual offender. While separate sentence ranges for habitual offenders should be included, the bill should not allow existing habitual offender provisions to apply when the offender was being sentenced under the new guidelines.

Response:

It would be too extreme to make such changes in the way that habitual offenders are dealt with. Strong

habitual offender enhancements are necessary to properly punish and incapacitate career criminals.

Against:

The guidelines are not neutral; the penalties for some crimes are increased and others are lowered. Out of the 700-plus felony offenses covered by the guidelines, there are at least 315, or 45 percent, for which the guidelines have assigned a range that is one or more classes lower than the current statutory maximum for that crime. Of those 315 crimes, 133 are assigned guidelines ranges that are two or more classes lower than the current maximum. While it is certainly within the legislature's authority to lower the sentences for these crimes and it may even be reasonable to do so, the changes should be made publicly and go through the entire legislative process on their own merits, not as part of a sentencing guidelines package.

For example, the guidelines would downgrade all attempts to commit felonies that carry a maximum possible sentence of five years or less to a maximum of one year in the county jail. Since many, if not most, "attempt" convictions are plea-bargained from completed offenses, the bill would lower punishment received by the offender and thereby the credibility of the system.

Against:

The bill fails to adequately consider the acute problem of prison and jail overcrowding. Guidelines developed without proper regard for correctional capacity not only could worsen overcrowding, but also could fail to ensure that limited prison and jail beds were used for the worst offenders. Estimates of the impact of the guidelines and the truth in sentencing bills have ranged from 4,500 to 5,700 new beds over the next decade, or eight to ten new prisons. Other estimates, taking into account the conservative nature of the parole board, project an increase from 42,000 to 65,000 prisoners over the next decade.

Response:

To argue against the guidelines because of potential prison and jail overcrowding would defeat the ends of justice and public safety. Criminals whose offenses and criminal backgrounds warrant incarceration should be incarcerated; their sentences should be those called for by the severity of their crimes, not by the severity of the state's problems with the corrections budget. If the guidelines mean that more criminals spend more time in prison, so be it. If this means that more prisons must be built, then so be it. It is time to put an end to the revolving door policy for prisons and time for criminals to be forced to face the punishment they deserve instead of being allowed an early out because they know how to work the system.

Furthermore, many of the more extreme estimates of an increase in prison population are based in whole or in part on earlier versions of the sentencing guidelines and truth in sentencing bills. Many changes have been made in this version of the package that will mitigate some of the impact on prison population, including lowering the sentencing ranges in many cases, and tie-barring the guidelines and truth in sentencing to other bills that will help to lower prison populations -- including House Bill 4065, which would repeal the section of the health code mandating life imprisonment for Schedule 1 narcotics (such as heroin) or cocaine (a Schedule 2 drug) offenses involving at least 650 grams (23 ounces) and instead require imprisonment "for life or any term of years," and House Bill 4515, which would make a high school diploma or a general education development (G.E.D.) certificate a condition of parole for a prisoner serving a minimum term of at least two years.

For:

Truth in sentencing is essential to improve public confidence in the criminal justice system, but, more importantly, it is essential to protect the public. All too often, heinous crimes have been committed by felons who would have still been in prison, had they been required to serve their minimum sentences in secure confinement. The current disciplinary credit system is both confusing and misleading. By eliminating disciplinary credits, the bills would ensure that most offenders would remain incarcerated for at least the duration of their minimum sentences. Truth in sentencing would also protect that offender's potential victims, and it would extend to past victims the peace of mind that can come from knowing the criminal was securely behind bars.

The bills would prevent crime, not only by more effectively incapacitating criminals, but the deterrent value of criminal sanctions would be enhanced by the bills' assurances of meaningful punishment. Although correctional costs would increase under the bill, those costs are small compared to the societal costs of crime -- crime that the bills would both prevent and appropriately punish. The bills would help to restore integrity, credibility and accountability to the criminal justice system, and help to fulfill the system's most important objective: the protection of the public.

Response:

Problems with some offenders serving too little time often have more to do with charging and sentencing

than with defects of the disciplinary credit system. It is prosecutors who decide what charges to bring, but plea bargaining sometimes results in charges that are lower than those suggested by the offense committed. Further, prosecutors have the discretion to seek habitual offender status for anyone with a prior felony conviction. Moreover, any problems with overly lenient sentencing practices should be cured through the implementation of the comprehensive sentencing guidelines that are encompassed in House Bill 5419.

Against:

Since relatively few criminals are caught and punished, the bills would have little effect on crime; the deterrent value of the prospect of punishment depends on the certainty of that punishment. The bills merely would worsen problems with prison overcrowding and the corrections budget, draining more money from the educational, economic, and rehabilitative programs that offer the best chance of ultimately lowering the crime rate.

Response:

Any positive effects of long-term anti-crime programs such as education cannot be felt for many years, perhaps generations. The bills, however, would provide reforms now.

Against:

The truth in sentencing changes are premature. With the implementation of the sentencing guidelines pending, a reasonable stance would be to wait and see how these guidelines impact the system and then, only if necessary, throw truth in sentencing into the mix. The effect of the guidelines should be to provide adequate sentences under the current system for crimes. If that is so, then the changes made by truth in sentencing will be unnecessary.

Against:

Many have assumed that the bills would have little effect on actual time served, because judges and proposed guidelines would adjust sentencing downward to accommodate "truth in sentencing," just as sentences presumably are adjusted upward now, to account for disciplinary credits. Under such circumstances, the bills would not represent truth in sentencing; rather, they would mislead crime victims and the public into believing that real change would ensue.

For:

By not applying disciplinary time to the prisoner's sentence and instead having it considered as part of his or her parole review, the bills avoid possible constitutional difficulties that could arise if the disciplinary time were used to increase a prisoner's sentence. It is asserted that over 80 percent of misconduct tickets are written for violations of prison policy directives regarding behavior and possessions, these can be something as minor as insolence or being in the wrong place or disobeying a direct order. As a result, a person's sentence could have been increased for acts that would not be punishable outside of prison walls, and scarce bedspace would be used for non-criminal conduct.

Response:

Major misconducts are directly related to the need to maintain prison discipline, including the need to prevent violence, drug abuse, gambling, and escapes. The corrections department can now in effect lengthen a prisoner's sentence by withdrawing disciplinary credits; it does not seem so different to allow the department to impose disciplinary time for the same behavior for which credits can now be withdrawn.

Against:

The bills will have little effect on the prison population as a whole. None of the bills deals with the problem of the increase in denial of parole, the increase in the rate of technical parole violators who are returned to prison, and the increase in the rate of probation violators being sent to prison. It is asserted that as many as 25 percent of all prison admissions in 1997 were for violations of probation. With the anticipated increase in the use of such penalties for nonviolent offenders included in the guidelines, it is likely that more violations of probation will occur, and when violations occur it is likely they will also go to prison unless changes occur. While it makes sense to penalize someone who has committed another crime while on parole or probation, technical violations should be punished by alternative means.

POSITIONS:

The Michigan Appellate Assigned Counsel System supports the adoption of legislative sentencing guidelines and the elimination of language that would require prisoners to serve time for accumulated disciplinary time. (5-7-98)

The State Bar Prisons and Corrections Section supports the elimination of provisions that would require prisoners to serve time for accumulated disciplinary time. (5-7-98)

The American Friends Service Committee opposes the truth in sentencing bills and opposes the guidelines because of their failure to consider prison capacity and because of the increased length of sentences for violent offenders. (5-7-98)

The Michigan Council on Crime and Delinquency opposes the truth in sentencing legislation and opposes the imposition of sentencing guidelines without further consideration of prison and jail capacity and mandatory and presumptive sentencing for drug offenders. (5-8-98)

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

This revised analysis replaces the analysis dated 8-6-98. 1776 HA 316

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SENTENCING GUIDELINES/ TRUTH IN SENTENCING

House Bill 5419 as enrolled
Public Act 317 of 1998
Sponsor: Rep. James McNutt
House Committee: Judiciary
Senate Committee: Judiciary

House Bill 5398 as enrolled
Public Act 315 of 1998
Sponsor: Rep. A.T. Frank
House Committee: Corrections
Senate Committee: Judiciary

Senate Bill 826 as enrolled
Public Act 316 of 1998
Sponsor: Sen. William Van Regenmorter
Senate Committee: Judiciary
House Committee: Judiciary

Revised Second Analysis (9-23-98)

House Bills 5419 and 5398 and Senate Bill 826 (9-23-98)

THE APPARENT PROBLEM:

Many members of the public are concerned by what they perceive as the failure of the criminal justice system to protect them by locking up violent criminals and keeping them locked up. The revolving door impression of the prison system leads many to feel frustrated about the lack of adequate punishment for criminals and the failure of the system to keep dangerous criminals off the streets. All too frequently, a criminal who has been sentenced to prison is released even before the end of his or her minimum term of imprisonment and then commits yet another crime. Anecdotes abound of lives lost or ruined by acts committed by violent criminals who would have still been behind bars if they had been kept locked up until the expiration of their minimum terms. People are and have been outraged by this all too common occurrence.

The answer, say many, is "truth in sentencing," a concept under which offenders would have to serve their minimum sentences. In 1994, legislation (Public Acts 217 and 218) was enacted to provide for "truth in sentencing." The effective date of the 1994 truth-in-sentencing legislation, however, was tied to the enactment of statutory sentencing guidelines, after the Sentencing Guidelines Commission submitted its report to the legislature. Under the truth-in-sentencing legislation, most prisoners would have to serve at least their judicially imposed minimum sentence. Some people believe that the truth-in-sentencing concept should now be made effective and that the concept should be extended to apply to all prisoners, rather than just those who are convicted of specific offenses.

On the other hand, many people are equally concerned with the failure of indeterminate sentencing to provide an evenhanded standard of punishment for crimes. (For a brief explanation of sentencing in Michigan, see Background Information.) Many believe that indeterminate sentencing systems have contributed to sentencing disparities where two offenders who commit very nearly the same crime and who have similar criminal histories may be sentenced to widely differing minimum terms. In 1979, the Michigan Supreme Court, apparently out of concerns regarding disparity in the imposition of criminal sentences throughout the state, appointed an advisory committee to research and design a sentencing guidelines system. In 1983, the guidelines were distributed to circuit court and Recorder's Court judges, for use on a voluntary basis. The following year, the supreme court mandated statewide use of the guidelines and

began collecting data to test the guidelines' validity and effectiveness. Michigan's criminal justice system has operated under these judicially-imposed sentencing guidelines since 1984.

A revised version of the judicial guidelines has been in effect since October 1, 1988, pursuant to a Supreme Court Administrative Order. No modifications or amendments have been made to the currently used sentencing guidelines since that date. These guidelines were designed to reduce disparity in sentencing from county to county and region to region by mirroring the existing sentencing practices of judges across the state at the time the guidelines were implemented. They were developed using the results of research on sentencing patterns of judges throughout Michigan, and attempt to capture the typical sentence for similar types of offenses and offenders. In designing the current system, the guidelines' impact on state and local correctional resources and budgets were not considered.

The supreme court's guidelines have been criticized on a number of grounds. For one thing, the guidelines essentially codified existing practices by reflecting the average sentences imposed for similar crimes and similar defendants rather than looking at what a reasonable sentence was for the particular crime. In addition, the current guidelines have been criticized both for excessive leniency and for undue harshness. As the state's prison overcrowding has worsened despite an expensive prison construction program, many have concluded that a comprehensive review and development of sentencing guidelines by the legislature (as it is the legislature that establishes the penalties for various offenses) was needed to ensure that limited prison and jail space were put to best use.

During the time that the judicially mandated sentencing guidelines have been in use, several bills were introduced in the legislature calling for an independent commission to develop a systematic statutory sentencing structure. Finally, in 1994, Public Act 445 provided for the selection of a 19-member Sentencing Guidelines Commission and charged it with designing and recommending to the legislature a new sentencing guidelines system.

The commission began its work in May of 1995, with the goal of developing sentencing guidelines that would provide for the protection of the public, that considered offenses involving violence against a person as more severe than other offenses, and that were proportionate to the seriousness of the offense and the offender's prior criminal record. In addition, the commission was instructed to take into account the capacity of state and local correctional facilities.

On October 22, 1997 the commission adopted its recommendations for a set of sentencing guidelines on a 12-3 vote and submitted them to the legislature for its approval. According to the law that established the commission, the commission's guidelines will not take effect unless they are enacted into law. Some people believe that the legislature should adopt a system of sentencing guidelines based on that report.

THE CONTENT OF THE BILLS:

The package of bills would enact sentencing guidelines and truth in sentencing. House Bill 5419, Senate Bill 826, and House Bill 5398 would amend, respectively, the Code of Criminal Procedure, the prison code, and the Department of Corrections (DOC) act to establish statutory sentencing guidelines and to modify and give effect to the provisions enacted in 1994 and commonly referred to as "truth-in-sentencing." House Bill 5419 would enact the sentencing guidelines. Senate Bill 826 and House Bill 5398 would provide for modifications and implementation of truth in sentencing.

The bills would take effect on December 15, 1998. [However, House Bill 5419 indicates that the sentencing guidelines established by the supreme court would not apply to felonies committed on or after January 1, 1999 and that on or after January 1, 1999, the minimum sentence for a crime would be determined under the sentencing guidelines in effect on the date the crime was committed.] None of the bills would take effect unless each of the bills are enacted and all of the following bills are also enacted:

-- House Bill 4065 (which would amend the Public Health Code to make drug-aided criminal sexual conduct and the attempt thereof a felony, add a substance to the code's schedule of controlled substances, and repeal the section of the health code mandating life imprisonment for Schedule 1 narcotics [such as heroin] or cocaine [a Schedule 2 drug] offenses involving at least 650 grams [23 ounces] and instead require imprisonment for life or any term of years, but not less than 20 years.)

-- House Bills 4444-4446 (which would revise penalties for larceny offenses and increase civil penalties for retail fraud).

-- House Bill 4515 (which would amend the Department of Corrections act [Public Act 232 of 1953], to make a high school diploma or a general education development [G.E.D.] certificate a condition of parole for a prisoner serving a minimum term of at least two years).

-- House Bill 5876 (which would amend correction ombudsman language).

House Bill 5419 would establish in statute most of the recommendations of the Michigan Sentencing Commission, although the bill includes a number of crimes that were not in the commission's recommendations, specifies lower sentence ranges in many cases, and includes some factors as prior record variables that were not included in the commission's recommendations.

The bill would add Chapter XVII to the Code of Criminal Procedure (MCL 769.8 et al.) to do all of the following:

--Classify over 700 criminal offenses into nine crime classes and six categories.

--Provide for the classification of some attempted crimes.

--Include instructions for scoring sentencing guidelines, including the application of 19 different offense variables and seven different prior record variables.

--Outline sentencing grids, with various recommended minimum sentence ranges, for each of the nine crime classifications.

--Require that, if a statute mandated a minimum sentence, the court impose the sentence in accordance with that statute.

--Set the longest allowable minimum sentence at two-thirds of the statutory maximum sentence (which would codify the "Tanner Rule").

--Provide for intermediate sanctions when a person's recommended minimum sentence range did not exceed 18 months.

--Allow a court to forego sentencing guidelines scoring for some departures from the appropriate sentence range.

--Provide for the Sentencing Commission to make recommended modifications to the sentencing guidelines.

Crime Classification. Under the bill, over 700 crimes in the Michigan Compiled Laws are divided into six categories: crimes against a person; crimes against property; crimes involving a controlled substance; crimes against public order; crimes against public trust; and crimes against public safety. The bill specifies, however, that the offense descriptions would be for assistance only, and that the listed statutes would govern the application of the sentencing guidelines. Within these categories, the crimes are then classified in nine different classes of descending severity. According to the Sentencing Commission's report, Class M2 is a separate classification for the offense of second-degree murder; and Classes A through H include crimes for which the following maximum sentences may be appropriate:

Class	Sentence
A	Life imprisonment
B	20 years' imprisonment
C	15 years' imprisonment
D	10 years' imprisonment
E	5 years' imprisonment
F	4 years' imprisonment
G	2 years' imprisonment
H	Jail or other intermediate sanctions

Attempted Crimes. The bill's sentencing guidelines would apply to an attempt to commit an offense listed in Chapter XVII only if the attempted violation were a felony. The sentencing guidelines structure would not apply, however, to an attempt to commit a Class H offense.

For an attempted offense listed in Chapter XVII, the offense category (e.g., crime against a person) would be the same as the attempted offense. An attempt to commit an offense listed in Chapter XVII would be classified as follows:

-- Class E, if the attempted offense were in Class A, B, C, or D.
-- Class H, if the attempted offense were in Class E, F, or G.

General Scoring. The bill includes instructions for scoring sentencing guidelines. For an offense listed in Chapter XVII, a judge would determine the recommended minimum sentence range by first finding the offense category for the offense. From the

variables spelled out in the bill, the judge then would determine the offense variables to be scored for that offense category and score and total only those offense variables. The judge also would have to score and total all prior record variables for the offense, as provided in the bill. Then, using the offense class, the judge would find the intersection of the offender's offense variable level and prior record variable level on the sentencing grid included in the bill to determine the recommended minimum sentence range. The bill shows the recommended minimum sentence within a sentencing grid as a range of months or life imprisonment.

Multiple Offense Scoring. If the defendant were convicted of multiple offenses, the applicable offense variables for each offense would have to be scored.

Attempted Offense scoring. If an offender were being sentenced for an attempted felony included in the sentencing guidelines structure, the judge would have to determine the offense variable level and prior record variable level based on the underlying attempted offense.

Habitual Offender scoring. If the offender were being sentenced under the Code of Criminal Procedure's habitual offender provisions, the judge would have to determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, the upper limit of the range determined under the bill's grid would have to be increased as follows:

-- By 25 percent, if the offender were being sentenced for a second felony.

-- By 50 percent, if the offender were being sentenced for a third felony.

-- By 100 percent, if the offender were being sentenced for a fourth or subsequent felony.

Crime Categories. For all crimes against a person, offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 19 would have to be scored. Offense variables 5 and 6 would have to be scored for homicide or attempted homicide. Offense variable 16 would have to be scored for a home invasion offense. Offense variables 17 and 18 would have to be scored if an element of the offense or attempted offense involved the operation of a vehicle, vessel, aircraft, or locomotive.

For all crimes against property, offense variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored.

For all crimes involving a controlled substance, offense variables 1, 2, 3, 12, 13, 14, 15, and 19 would have to be scored.

For all crimes against public order and all crimes against public trust, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored.

For all crimes against public safety, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 would have to be scored. If an element of the offense involved the operation of a vehicle, vessel, aircraft, or locomotive, offense variable 18 would have to be scored.

Offense Variables. The bill identifies each of the 19 offense variables and would assign various points to be scored depending on whether and how the offense variable applied to the particular violation.

Offense variable 1 would be aggravated use of a weapon; offense variable 2 would be lethal potential of the weapon used; offense variable 3 would be physical injury to a victim; offense variable 4 would be psychological injury to a victim; and offense variable 5 would be psychological injury to a member of a victim's family.

Offense variable 6 would be the offender's intent to kill or injure another individual; offense variable 7 would be aggravated physical abuse; offense variable 8 would be asportation or captivity; offense variable 9 would be the number of victims; and offense variable 10 would be exploitation of a vulnerable victim.

Offense variable 11 would be criminal sexual penetration; offense variable 12 would be contemporaneous felonious criminal acts; offense variable 13 would be continuing the pattern of criminal behavior; offense variable 14 would be the offender's role; and offense variable 15 would be aggravated controlled substance offenses.

Offense variable 16 would be property obtained, damaged, lost, or destroyed; offense variable 17 would be degree of negligence exhibited; offense variable 18 would be operator ability affected by alcohol or abuse; and offense variable 19 would be a threat to the security of a penal institution or court, or interference with the administration of justice.

Prior Record Variables. The bill identifies seven prior record variables and would assign various points to be scored depending on whether and how the prior record variable applied to the particular violation.

Prior record variable 1 would be "prior high severity felony convictions," which would mean a conviction for a crime listed in offense class M2, A, B, C, or D. Prior record variable 2 would be "prior low severity felony convictions," which would mean a conviction for a crime listed in offense class E, F, G, or H.

Prior record variable 3 would be "prior high severity juvenile adjudications," which would mean a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D, if committed by an adult. Prior record variable 4 would be "prior low severity juvenile adjudications," which would mean a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H, if committed by an adult.

Prior record variable 5 would be prior misdemeanor convictions, prior misdemeanor juvenile adjudications, or parole or probation violations; prior record variable 6 would be relationship to the criminal justice system; and prior record variable 7 would be subsequent or concurrent felony convictions.

In scoring prior record variables 1 through 5, a conviction or juvenile adjudication could not be used if it preceded a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

Sentencing Grids. The bill specifies a grid of minimum sentencing ranges for each class of offenses (M2 and A through H). The appropriate minimum sentencing range would be determined by scoring the offense variable point level on one axis of the grid and the prior record variable point level on the other axis, then finding the intersecting cell of the grid.

For each offense class, the bill specifies the lowest minimum sentence cell range and the highest minimum sentence cell range, as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M2	90-150	365-600, or life
A	21-35	270-450, or life
B	0-18	117-160
C	0-11	62-114
D	0-6	43-76
E	0-3	24-38
F	0-3	17-30
G	0-3	7-23
H	0-1	5-17

[Note: These are lower in many instances than those recommended by the commission. The commission recommendations are as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M290-150		365-600, or life
A	21-35	270-450, or life
B	0-18	117-160
C	0-12	78-120
D	0-6	54-80
E	0-3	30-40
F	0-3	21-32
G	0-3	9-24
H	0-1	6-18

Presentence Reports. A probation officer who was required to provide the court with a presentence investigation could have his or her name removed from the report by request to the court, if the report had been amended or altered prior to sentencing by the officer's supervisor or by any other person with authority to amend or alter a presentence investigation report.

Mandatory Minimums. The bill specifies that if a statute mandated a minimum sentence, the court would have to impose a sentence in accordance with that statute. Imposing a statutory mandatory minimum sentence would not be considered a departure from the sentencing guidelines' minimum sentence range.

"Tanner Rule." The bill would prohibit a court from imposing a minimum sentence, including a departure from the sentencing guidelines' minimum sentence range, that exceeded two-thirds of the statutory maximum sentence. (This would codify the "Tanner Rule," established by case law, which sets two-thirds of a maximum sentence as the longest minimum sentence allowed in Michigan's indeterminate sentencing system.)

Intermediate Sanctions. If the upper limit of the recommended minimum sentence range under the sentencing guidelines was 18 months or less, the court

would have to impose an intermediate sanction unless the court stated on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the Department of Corrections. Under the bill, an intermediate sanction could include a jail term that did not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever was less. (The code currently defines "intermediate sanction" as probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed; including, for example, drug treatment, mental health treatment, jail, community service, or electronic monitoring.)

Absent a departure from sentencing guidelines' minimum sentence range, if the upper limit of the sentencing guidelines' recommended minimum sentence exceeded 18 months and the lower limit of the minimum sentence range was 12 months or less, the court would have to sentence the offender to either imprisonment with a minimum term within that range, or an intermediate sanction that could include a term of imprisonment of not less than the minimum range or more than 12 months.

The court would have to impose a sentence of life probation, absent a departure from the sentencing guidelines' minimum sentence range, for manufacturing, delivering, possessing with intent to deliver, or possessing a mixture that contained less than 50 grams of a Schedule 1 or 2 narcotic or cocaine where the upper limit of the recommended minimum sentence range was 18 months or less.

In addition, if an attempt to commit a Class H felony were punishable by imprisonment for more than one year, the court would have to impose an intermediate sanction upon conviction of that offense, absent a departure from the sentencing guidelines' minimum sentence range.

The department would be required to operate a jail reimbursement program to provide funding to counties for housing offenders in county jails who otherwise would have been sentenced to prison. The criteria for and the rate of reimbursement would be required to be established in the appropriations act for the Department of Corrections.

Departures. The code specifies that a court may depart from the appropriate sentence range established under statutory sentencing guidelines if the court has a substantial and compelling reason and states on the record the reasons for departure. The court may not base a departure on an offense characteristic or offender characteristic already considered in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic was given inadequate or disproportionate weight.

Sentencing Commission. The bill would revise provisions of the code that created the Michigan Sentencing Commission and specified its responsibilities. The commission would be charged with developing recommended modifications to the sentencing guidelines, rather than developing the recommended guidelines themselves. Modifications to the enacted guidelines could be recommended no sooner than January 1, 2001, unless based on omissions, technical errors, changes in law or court decisions.

The bill also would delete the code's schedules for the commission to develop and submit recommended sentencing guidelines, to submit revised guidelines if the legislature failed to enact the recommended guidelines within a specified period, and to submit subsequent modifications to enacted guidelines. The commission would have to submit recommended modifications to the Secretary of the Senate and the Clerk of the House of Representatives. If the legislature failed to enact the modifications within 60 days after introduction of a bill to enact them, the commission would have to revise the recommended modifications and resubmit them to the secretary and the clerk within 90 days. Until the legislature enacted modifications, the sentencing commission would have to continue to revise and resubmit the modifications under this schedule.

Enhancements. The bill would prohibit the use of a conviction to enhance a sentence where the conviction had been used to enhance a sentence under a statute that prohibited the use of the conviction for further enhancement. This would comport with the provisions of House Bills 4444-4446.

Disciplinary time. The bill would also eliminate references to disciplinary time as necessitated by the changes in the truth in sentencing bills.

Senate Bill 826 would amend the prison code (MCL 800.34 and 800.35) to provide for the parole board to receive and consider a prisoner's disciplinary time in making its decision to parole that prisoner.

Currently, the prison code includes provisions for the addition of disciplinary time to the minimum sentence of a "prisoner subject to disciplinary time" for each major misconduct for which he or she is found guilty. Accumulated disciplinary time is to be added to a prisoner's minimum sentence in order to determine his or her parole eligibility date. "Prisoner subject to disciplinary time" means a prisoner sentenced on or after the effective date of the disciplinary time provision to an indeterminate term of imprisonment for specified offenses. (The disciplinary time provisions were part of the 1994 "truth-in-sentencing" legislation, but the effective date of the provisions was delayed until sentencing guidelines are enacted into law after the sentencing commission submits recommended guidelines.)

Instead of requiring that disciplinary time be added to a prisoner's minimum sentence, the bill would require instead that a prisoner's accumulated disciplinary time be submitted to the parole board for consideration at the prisoner's parole review or interview. In addition, the Department of Corrections would be required to promulgate rules setting the amount of disciplinary time that would be submitted to the parole board for each type of major misconduct.

The bill would also change the definition of a "prisoner subject to disciplinary time" so that the provisions would apply to both of the following:

-- A prisoner who was sentenced to an indeterminate term for any of the specified offenses, if the crime were committed on or after December 15, 1998 (the effective date of the sentencing guidelines proposed by House Bill 5419).

-- A prisoner who was sentenced to an indeterminate term for any other crime, if that crime were committed on or after December 15, 2000.

Finally, the bill would also repeal the sections of the "truth-in-sentencing" legislation (Public Acts 217 and 218 of 1994) that delay the effective date of those provisions until after the sentencing commission submits its recommended guidelines and sentencing guidelines are enacted.

House Bill 5398 would amend the Department of Corrections act (MCL 791.233 et al.) to require that a statement of a prisoner's disciplinary time be submitted to the parole board and to remove provisions that would have allowed for disciplinary time to be added to a prisoner's minimum term for parole eligibility. However, the bill would allow for disciplinary time to be added to a prisoner's minimum sentence when determining the prisoner's eligibility for "extension of the limits of confinement" (this could include release to visit a critically ill relative, attend a relative's funeral, to contact prospective employers, or to receive medical treatment not otherwise available to the prisoner for those confined in a state correctional facility, or placement in a community residential home or a community corrections center, and work, or participation in an education, training, or drug treatment program.). Prisoners who were eligible for an extension of the limits of confinement would not be eligible until they had served their minimum sentence plus any disciplinary time. (Note: "Community corrections center" means a facility either contracted for or operated by the Department of Corrections in which a security staff is on duty seven days per week and 24 hours per day. "Community residential home" means a location where electronic monitoring of prisoner presence is provided by the Department of Corrections seven days per week and 24 hours per day, except that the department may waive the requirement that electronic monitoring be provided as to any prisoner who is within three months of his or her parole date.)

In addition, the bill would provide new standards to allow for the parole of offenders who had been sentenced to life in prison for violations of the public health code mandating life imprisonment for Schedule 1 narcotics [such as heroin] or cocaine [a Schedule 2 drug] offenses involving at least 650 grams [23 ounces] (known as the drug-lifer laws). [Note: The so-called drug-lifer provisions would be amended by House Bill 4065.] A prisoner who was serving a life sentence under the drug-lifer law would be eligible for parole after serving 17½ years or 20 years of his or her sentence depending upon whether or not he or she had also been convicted of another "serious crime" (A serious crime would include assault with intent to maim, rob or steal (armed or unarmed), commit murder, criminal sexual conduct, or a felony not otherwise punished; first and second degree murder; manslaughter; kidnaping; taking a hostage; kidnaping a child under the age of 14; mayhem; first, second, and third degree criminal sexual conduct; armed and unarmed robbery; and car jacking.) A prisoner who had been convicted of a serious crime in addition to the drug crime for which he or she was incarcerated would not be eligible for parole until he or she had served 20 years of his or her sentence. [Note: The bill contains a reference to a subsection as an exception to when a prisoner would be eligible for

parole consideration; however, the referenced subsection is a definition for the term serious crime. The intent was apparently to reference the subsection providing special allowances for prisoners who had cooperated with law enforcement.]

If the sentencing judge, or his or her successor, determined on the record that a prisoner sentenced to life imprisonment under the drug-lifer laws had cooperated with law enforcement, the prisoner would be subject to the jurisdiction of the parole board. Provided that he or she meet the considerations outlined for parole, the prisoner could be released on parole 2½ years earlier than he or she would otherwise be eligible for release. A prisoner would be considered to have cooperated with law enforcement if the court determined that the prisoner had no relevant or useful information to provide. Merely exercising his or her right to a trial by jury could not be treated as a failure or refusal to cooperate. If, at sentencing, the court determined that a prisoner had cooperated with law enforcement, the court would be required to include that determination in the judgment of sentence.

When determining whether or not a prisoner who was serving a life sentence under the drug lifer law prior to October 1, 1998 should be released on parole, the parole board would be required to consider whether the violation was part of a continuing series of violations of drug laws by the individual, or whether the violation was committed by the individual in concert with five or more other individuals. In addition, the board would have to consider whether the individual was the principal administrator, organizer, or leader of an entity that the individual knew or had reason to know committed violations of the drug laws or was organized, in whole or in part, to commit violations of the drug laws, and whether the violation for which the individual was convicted was committed to further interests of that entity; whether the violation was committed in a drug-free school zone; or whether the violation involved the delivery of a controlled substance to a minor under the age of 17 or possession with the intent to deliver to such a minor.

A parolee from a drug-lifer sentence, released on parole under the bill's provisions, would have his or her parole revoked if he or she violated or conspired to violate a drug law which was punishable by four or more years of imprisonment, or committed a violent felony while on parole. The prisoner's parole order would be required to include a notice that parole would be revoked for such actions. (A "violent felony" would include all of the crimes listed in the definition of a serious crime plus felonious assault and fourth degree criminal sexual conduct.)

In addition, the bill would require the governing bodies of the Senate and House Fiscal Agencies to have access to all Department of Corrections records that relate to individuals under the department's supervision. This would include, but not be limited to, records contained in basic information reports, the corrections management information system, the parole board information system, and any successor databases. However, access to these records would not be allowed if the department determined that access was restricted or prohibited by law, or could jeopardize an ongoing investigation, the safety of a prisoner, employee or other person, or the safety, custody or security of an institution or other facility. The governing board of the Senate Fiscal Agency, the governing committee of the House Fiscal Agency, and the DOC would enter a written agreement to establish which records would be accessed and the manner of access and to ensure the confidentiality of the accessed records.

The provisions regarding notice and proceedings for parole interviews by a parole board member for prisoners under a life sentence (except those sentenced for first degree murder or for a major controlled substance offense) would also be amended so that notice and proceedings would be provided in the same fashion for those prisoners as it is currently required for other prisoners.

Finally, the bill would change references to the "probate court" concerning mental health commitments and persons requiring treatment to "appropriate court" because the family division of the circuit court could have ancillary jurisdiction.

BACKGROUND INFORMATION:

Criminals in Michigan are sentenced under an indeterminate sentencing structure, meaning, basically, that the sentencing judge sets minimum and maximum terms to be served. The maximum term is limited to the maximum set by statute, while, typically, the minimum term is chosen from a range suggested by the use of supreme court sentencing guidelines, which weight various factors regarding the facts of the case and the criminal history of the offender; a judge may depart from guidelines, however, and order a minimum term greater or lesser than those suggested by guidelines, but must state his

or her reasons on the record. Case law determines what constitutes acceptable reasons for departing from guidelines. In any event, under a controlling 1972 opinion of the Michigan Supreme Court, the minimum sentence cannot be more than two-thirds the maximum established by statute (People v. Tanner, 387 Mich 683).

The exact duration of the sentence served is not established at the time of sentencing; thus, sentencing is "indeterminate." The actual time that an offender serves in prison or some other correctional facility is a function of the minimum sentence and several other factors. Under Michigan statute, a minimum sentence may be reduced by the accumulation of "disciplinary credits" awarded by the Department of Corrections to prisoners. A prisoner is eligible to earn a disciplinary credit of five days per month for each month served without a major misconduct violation, plus an additional two days per month of "special disciplinary credits" awarded for good institutional conduct. A prisoner is eligible for parole upon serving his or her minimum sentence less any accumulated disciplinary credits. (While this explanation describes the disciplinary credit system for new prison intakes, it should be noted that offenders currently within the jurisdiction of the corrections system may be subject to alternate calculations of "good time" [which was eliminated by Proposal B of 1978 for certain serious offenders], or some combination of good time and disciplinary credits.)

A prisoner becomes eligible for parole upon completing his or her minimum sentence, minus any reductions for good time or disciplinary credits. Prior to parole, a prisoner may be placed in a community corrections facility; by law, however, assaultive offenders may not receive community placement prior to 180 days before the expiration of their minimum terms.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The current, judicially established, sentencing guidelines are inadequate and need to be replaced. The legislature recognized this in 1994 when it passed Public Act 445, which created the Michigan Sentencing Commission and charged it with developing recommendations for a comprehensive statutory sentencing guidelines structure. The judicial guidelines reportedly incorporate only about 100 offenses, and are designed to be reflective of past sentencing practices, rather than providing a considered statement of public policy regarding criminal sentencing.

By enacting the system recommended in the bill, the legislature will be making a clear and rational declaration of public policy on the issues of crime and punishment, rather than passively accepting a working average emerging out of judicial practice. A rational and comprehensive system of sentencing guidelines will ensure that justice is served, bias is removed from decision-making, and limited prison and jail resources are used to their best advantage--that is, to house the worst offenders.

The classification and grid system proposed in the bill was created by a commission of experts, supported by a professional staff and operating with clear statutory objectives. This sentencing structure reflects a philosophy of ensuring that violent and repeat offenders are to be treated more harshly than other offenders. Further, in the guidelines, crimes against people are punished more severely than property crimes and many nonviolent crimes are punished with shorter sentences or no prison time. Sentencing practices, then, would be more proportionate to both the seriousness of the offense and the offender's prior criminal record.

For:

While there has in the past been some concern over whether sentencing guidelines are within the proper purview of the legislature, any lingering doubts have been answered by the discussion in the supreme court's decision in People v Milbourn (461 N.W.2d 1, 435 Mich. 630): the court expressed reluctance to require strict adherence to guidelines because the court's guidelines did not have a legislative mandate. The court also noted that departures would be appropriate where guidelines did not adequately account for important factors legitimately considered at sentencing, and that to require strict adherence would effectively prevent their evolution. Many feel that the decision eliminated, for practical purposes, the effectiveness and enforceability of the current guidelines. As a result, legislatively enacted sentencing guidelines are even more urgently needed to provide enforceable restraint on the exercise of judicial discretion. Without effective guidelines disparities in sentencing based on race, ethnicity, local

attitudes, and the biases of individual judges will become commonplace.

Against:

The bill could unduly interfere with the discretion of the judicial branch to deal with individual circumstances. Although departures from sentencing guidelines would be allowed, they would be limited to cases that presented "substantial and compelling" reasons. Generally, to the extent that the bill limited judicial discretion, it would place sentencing power in the hands of prosecutors through the exercise of prosecutorial discretion over how offenders are charged. Sentencing decisions are best left where they belong, in the hands of impartial judges.

Response:

The unrestrained exercise of judicial discretion can lead to sentencing practices that vary from county to county and court to court, opening avenues for personal bias or philosophical differences to influence sentencing decisions. Sentencing guidelines are supposed to remove bias and make sentencing more uniform by quantifying offense and offender characteristics. The guidelines offer adequate provision for individual circumstances by allowing guidelines to be set aside for "substantial and compelling" reasons, subject to review by appellate courts.

Against:

The bill would require the use of "intermediate sanctions," including jail and nonincarcerative sanctions, for offenders with guidelines minimums of 18 months or less; the proposal suggests that more felons will have to be dealt with locally. Without adequate funding and support from the state, the bill could exacerbate problems for already overburdened jails and alternative programs.

Response:

Provision has been made for state reimbursement to counties for the costs of housing certain individuals in county jails. The amount and criteria for this reimbursement will be established in the Department of Corrections appropriations act.

Against:

The legislation should do more to curb inappropriate sentences that would result from applying the same factors more than once. Because guidelines themselves take criminal history into account, the justice of applying habitual offender sentence enhancements on top of this is debatable. The bill would provide for the sentences of second, third, and fourth repeat offenders to be lengthened by 25, 50, and 100 percent, respectively. This would be in addition to the fact that the habitual offender grid would expand the minimum range for the crime based on prior record. To make matters worse, the decision as to whether the prior record would be counted twice is left to the prosecutor who decides whether to charge the individual as a habitual offender. While separate sentence ranges for habitual offenders should be included, the bill should not allow existing habitual offender provisions to apply when the offender was being sentenced under the new guidelines.

Response:

It would be too extreme to make such changes in the way that habitual offenders are dealt with. Strong habitual offender enhancements are necessary to properly punish and incapacitate career criminals.

Against:

The guidelines are not neutral; the penalties for some crimes are increased and others are lowered. Out of the 700-plus felony offenses covered by the guidelines, there are at least 315, or 45 percent, for which the guidelines have assigned a range that is one or more classes lower than the current statutory maximum for that crime. Of those 315 crimes, 133 are assigned guidelines ranges that are two or more classes lower than the current maximum. While it is certainly within the legislature's authority to lower the sentences for these crimes and it may even be reasonable to do so, the changes should be made publicly and go through the entire legislative process on their own merits, not as part of a sentencing guidelines package.

For example, the guidelines would downgrade all attempts to commit felonies that carry a maximum possible sentence of five years or less to a maximum of one year in the county jail. Since many, if not most, "attempt" convictions are plea-bargained from completed offenses, the bill would lower punishment received by the offender and thereby the credibility of the system.

Against:

The bill fails to adequately consider the acute problem of prison and jail overcrowding. Guidelines developed without proper regard for correctional capacity not only could worsen overcrowding, but also could fail to ensure that limited prison and jail beds were used for the worst offenders. Estimates of the impact of the guidelines and the truth in sentencing bills have ranged from 4,500 to 5,700 new beds over the next decade, or eight to ten new prisons. Other estimates, taking into account the conservative nature of the parole

board, project an increase from 42,000 to 65,000 prisoners over the next decade.

Response:

To argue against the guidelines because of potential prison and jail overcrowding would defeat the ends of justice and public safety. Criminals whose offenses and criminal backgrounds warrant incarceration should be incarcerated; their sentences should be those called for by the severity of their crimes, not by the severity of the state's problems with the corrections budget. If the guidelines mean that more criminals spend more time in prison, so be it. If this means that the state needs more prisons, then more prisons should be built. It is time to put an end to the revolving door policy for prisons and time for criminals to be forced to face the punishment they deserve instead of being allowed an early out because we are more worried about the monetary cost of imposing an appropriate punishment than we are about the social cost of failing to impose such punishment.

Furthermore, many of the more extreme estimates of an increase in prison population are based in whole or in part on earlier versions of the sentencing guidelines and truth in sentencing bills. Many changes have been made in this version of the package that will mitigate some of the impact on prison population, including lowering the sentencing ranges in many cases, and tie-barring the guidelines and truth in sentencing to other bills that will help to lower prison populations -- including House Bill 4065, which would repeal the section of the health code mandating life imprisonment for Schedule 1 narcotics (such as heroin) or cocaine (a Schedule 2 drug) offenses involving at least 650 grams (23 ounces) and instead require imprisonment "for life or any term of years, but not less than 20 years," and House Bill 4515, which would make a high school diploma or a general education development (G.E.D.) certificate a condition of parole for a prisoner serving a minimum term of at least two years.

For:

Truth in sentencing is essential to improve public confidence in the criminal justice system, but, more importantly, it is essential to protect the public. All too often, heinous crimes have been committed by felons who would have still been in prison, had they been required to serve their minimum sentences in secure confinement. The current disciplinary credit system is both confusing and misleading. By eliminating disciplinary credits, the bills would ensure that most offenders would remain incarcerated for at least the duration of their minimum sentences. Truth in sentencing would also protect that offender's potential victims, and it would extend to past victims the peace of mind that can come from knowing the criminal was securely behind bars.

The bills would prevent crime, not only by more effectively incapacitating criminals, but the deterrent value of criminal sanctions would be enhanced by the bills' assurances of meaningful punishment. Although correctional costs would increase under the bill, those costs are small compared to the societal costs of crime -- crime that the bills would both prevent and appropriately punish. The bills would help to restore integrity, credibility and accountability to the criminal justice system, and help to fulfill the system's most important objective: the protection of the public.

Response:

Problems with some offenders serving too little time often have more to do with charging and sentencing than with defects of the disciplinary credit system. It is prosecutors who decide what charges to bring, but plea bargaining sometimes results in charges that are lower than those suggested by the offense committed. Further, prosecutors have the discretion to seek habitual offender status for anyone with a prior felony conviction. Moreover, any problems with overly lenient sentencing practices should be cured through the implementation of the comprehensive sentencing guidelines that are encompassed in House Bill 5419.

Against:

Since relatively few criminals are caught and punished, the bills would have little effect on crime; the deterrent value of the prospect of punishment depends on the certainty of that punishment. The bills merely would worsen problems with prison overcrowding and the corrections budget, draining more money from the educational, economic, and rehabilitative programs that offer the best chance of ultimately lowering the crime rate.

Response:

Any positive effects of long-term anti-crime programs such as education cannot be felt for many years, perhaps generations. The bills, however, would provide reforms now.

Against:

The truth in sentencing changes are premature. With the implementation of the sentencing guidelines pending, a reasonable stance would be to wait and see how these guidelines impact the system and then, only if necessary, throw truth in sentencing into the mix. The effect of the guidelines should be to provide adequate sentences under the current system for

crimes. If that is so, then the changes made by truth in sentencing will be unnecessary.

Against:

Many have assumed that the bills would have little effect on actual time served, because judges and proposed guidelines would adjust sentencing downward to accommodate "truth in sentencing," just as sentences presumably are adjusted upward now, to account for disciplinary credits. Under such circumstances, the bills would not represent truth in sentencing; rather, they would mislead crime victims and the public into believing that real change would ensue.

For:

By not applying disciplinary time to the prisoner's sentence and instead having it considered as part of his or her parole review, the bills avoid possible constitutional difficulties that could arise if the disciplinary time were used to increase a prisoner's sentence. It is asserted that over 80 percent of misconduct tickets are written for violations of prison policy directives regarding behavior and possessions, these can be something as minor as insolence or being in the wrong place or disobeying a direct order. As a result, a person's sentence could have been increased for acts that would not be punishable outside of prison walls, and scarce bedspace would be used for non-criminal conduct.

Response:

Major misconducts are directly related to the need to maintain prison discipline, including the need to prevent violence, drug abuse, gambling, and escapes. The corrections department can now in effect lengthen a prisoner's sentence by withdrawing disciplinary credits; it does not seem so different to allow the department to impose disciplinary time for the same behavior for which credits can now be withdrawn.

Against:

The bills will have little effect on the prison population as a whole. None of the bills deals with the problem of the increase in denial of parole, the increase in the rate of technical parole violators who are returned to prison, and the increase in the rate of probation violators being sent to prison. It is asserted that as many as 25 percent of all prison admissions in 1997 were for violations of probation. With the anticipated increase in the use of such penalties for nonviolent offenders included in the guidelines, it is likely that more violations of probation will occur, and when violations occur it is likely they will also go to prison unless changes occur. While it makes sense to penalize someone who has committed another crime while on parole or probation, technical violations should be punished by alternative means.

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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BILL ANALYSIS

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Senate Bill 826 (as enrolled)
House Bill 5398 (as enrolled)
House Bill 5419 (as enrolled)
Sponsor: Senator William Van Regenmorter (Senate Bill 826)
Representative A.T. Frank (House Bill 5398)
Representative James McNutt (House Bill 5419)
Senate Committee: Judiciary
House Committee: Judiciary

PUBLIC ACT 316 of 1998
PUBLIC ACT 315 of 1998
PUBLIC ACT 317 of 1998

Date Completed: 10-23-98

RATIONALE

Except when a mandatory sentence for a particular offense is prescribed by law, Michigan's criminal justice system uses an indeterminate sentencing policy. Maximum sentences for criminal offenses are specified in statute and a judge imposes a minimum sentence. Some people have long been concerned that this sentencing system may fail to provide an evenhanded statewide standard for punishment of criminals. They contend that the broad discretion afforded judges in this indeterminate sentencing structure has contributed to sometimes vast sentencing disparities in which two similar offenders may receive widely differing criminal sentences. In 1979, the Michigan Supreme Court, apparently out of concerns regarding disparity in the imposition of criminal sentences throughout the State, appointed an advisory committee to research and design a sentencing guidelines system. In 1983, the guidelines were distributed to circuit court and Recorder's Court judges, for use on a voluntary basis. The following year, the Supreme Court mandated statewide use of the guidelines and began collecting data to test their validity and effectiveness. Michigan's criminal justice system has operated under these judicially imposed sentencing guidelines since 1984.

A revised version of the judicial guidelines has been in effect since October 1, 1988, pursuant to a Supreme Court administrative order. No modifications or amendments were made to the judicially mandated sentencing guidelines after that date. These guidelines were designed to reduce disparity in sentencing from county to county and region to region by mirroring the existing sentencing practices of judges across the State at the time the guidelines were implemented. They were developed using the results of research on sentencing patterns of judges throughout Michigan, and attempted to capture the typical sentence for similar types of offenses and offenders. When this system was designed, the guidelines' impact on State and local correctional resources and budgets was not considered.

During the time that the judicially mandated sentencing guidelines were in use, several bills proposed an independent commission to develop a systematic statutory sentencing structure. In 1994, Public Act 445 established the Michigan Sentencing Commission and charged it with designing and recommending to the Legislature a new sentencing guidelines system. The Commission began its work in May 1995, with the goal of developing sentencing guidelines that would provide for the protection of the public, would treat offenses involving violence against a person more severely than other offenses, and would be proportionate to the seriousness of the offense and the offender's prior criminal record. The Commission also was instructed by its enabling legislation to take into account the capacity of State and local correctional facilities. On October 22, 1997, the Commission adopted its recommendations for a set of sentencing guidelines on a 12-3 vote and submitted them to the Legislature for its approval. The recommendations include the classification of numerous crimes, based on their nature and the maximum punishment imposed by statute. Many people advocated the adoption of statutorily imposed sentencing guidelines based on that report.

Recycled Paper

Further, in a 1990 Michigan Supreme Court decision *(People* v *Milbourn*, 435 Mich 630) that changed the appellate standard for reviewing sentences imposed by trial courts, the Court declined to require trial courts to adhere strictly to the judicial sentencing guidelines because they did not have a legislative mandate, and stated that trial courts could continue to depart from the guidelines' recommended sentencing ranges if a range were disproportionate to the seriousness of the offense. Some felt that this left unclear the appropriate use of the judicial sentencing guidelines and suggested that statutory guidelines should be developed.

In addition, some people believe that the range of prison terms specified in Michigan's indeterminate sentencing system can be misleading, because the actual time a prisoner spends in incarceration almost always is less than his or her minimum term. Sentence reduction programs administered by the Department of Corrections (DOC)--the earning of "good time" and "disciplinary credits"--act to move up a prisoner's parole eligibility date. In addition, most prisoners are eligible to participate in community residential placement (CRP) programs up to two years before they will be eligible for parole. Often, these parolees or CRP participants then commit new crimes. This has led many people to feel frustrated about the apparent inability of the criminal justice system to keep dangerous criminals off the streets. In response to these concerns, the Legislature approved, and the Governor signed into law, a 1994 measure to enact provisions commonly known as "truth-in-sentencing". Under that legislation, most prisoners would have to serve at least their judicially imposed minimum sentence. For certain specified crimes, disciplinary credits and good time (which *reduce* a prisoner's minimum sentence by hastening parole eligibility) would be eliminated and those prisoners would be subject to "disciplinary time" for prison infractions (which would *increase* a prisoner's minimum sentence by delaying parole eligibility). The effective date of the 1994 truth-in-sentencing legislation, however, was tied to the enactment of statutory sentencing guidelines, after the Sentencing Commission submitted its report to the Legislature. Also, the 1994 legislation's use of disciplinary time to lengthen a prisoner's minimum sentence has been a controversial aspect of that measure. Some people believed that the truth-in-sentencing concept should be extended to apply to all prisoners, rather than just those who are convicted of specific offenses and that disciplinary time should not automatically lengthen a term of incarceration. (For further information on Michigan's sentencing policies, truth-in-sentencing, and the *Milbourn* decision, see **BACKGROUND**.)

CONTENT

Senate Bill 826 and House Bills 5398 and 5419 amended, respectively, the prison code, the Department of Corrections law, and the Code of Criminal Procedure to establish statutory sentencing guidelines that will apply to enumerated felonies committed on or after January 1, 1999; and to provide for the effectiveness of provisions enacted in 1994 and commonly referred to as "truth-in-sentencing", extend these provisions to all crimes committed on or after December 15, 2000, and delete the requirement that disciplinary time be added to a prisoner's minimum sentence. House Bill 5398 also requires that the governing bodies of the Senate and House Fiscal Agencies be given access to DOC records and includes provisions added by Senate Bill 281 (Public Act 314 of 1998) relating to parole for major controlled substance offenses.

The bills will take effect on December 15, 1998. The bills are tie-barred to each other and to all of the following:

- House Bill 4065 (Public Act 319), which amended the Public Health Code to allow a sentence of at least 20 years' imprisonment, rather than a mandatory life sentence, for manufacturing, creating, delivering, or possessing with intent to deliver 650 grams or more of a mixture containing a Schedule 1 or 2 narcotic or cocaine; make it a felony, punishable by up to 20 years' imprisonment, for a person to deliver a controlled substance or cause a controlled substance to be delivered to a person in order to commit or attempt various criminal sexual conduct (CSC) offenses; and add "flunitrazepam" and "prazepam" to the Public Health Code's list of Schedule 4 controlled substances.
- House Bills 4444 and 4445 (Public Acts 311 and 312), which amended the Michigan Penal Code to raise the felony threshold level and increase the penalties for various larceny, property damage, and bad check offenses.
- House Bill 4446 (Public Act 313), which amended the Revised Judicature Act (RJA) to require the payment of specific fees and charges for checks written on insufficient funds or no account and revise a provision of the RJA concerning the recovery of

damages and costs by a merchant who is a victim of retail fraud.

- House Bill 4515 (Public Act 320), which amended the DOC law to make, with certain exceptions, earning a high school diploma or a general education development (G.E.D.) certificate a condition of parole for a prisoner serving a minimum term of at least two years.
- House Bill 5876 (Public Act 318), which amended Public Act 46 of 1975, to revise the procedures and duties of the Legislative Corrections Ombudsman.

Senate Bill 826

The prison code, under provisions enacted in 1994 but whose effective date was tied to the enactment of sentencing guidelines, states that a prisoner subject to disciplinary time must receive disciplinary time for each major misconduct for which he or she is found guilty. The bill deletes provisions requiring that a prisoner's accumulated disciplinary time be added to his or her minimum sentence in order to determine the prisoner's parole eligibility date. Instead, the bill requires that accumulated disciplinary time be submitted to the parole board for consideration at the prisoner's parole review or interview.

In addition, the bill expands the definition of "prisoner subject to disciplinary time". Under the provisions enacted in 1994, that term includes prisoners sentenced to an indeterminate term of imprisonment on or after the effective date of the disciplinary time provisions for any of the following offenses:

- Drunk driving or drunk boating that caused a death or long-term incapacitating injury (MCL 257.625(4), 257.625(5), 281.1171(4), and 281.1171(5)).
- Burning a dwelling house or other real property (MCL 750.72 and 750.73).
- Setting fire to mines and mining materials (MCL 750.80).
- Felonious assault; assault with intent to murder; assault with intent to do great bodily harm, less than murder; assault with intent to maim; assault with intent to commit a felony; and armed or unarmed assault with intent to rob or steal (MCL 750.82-750.89).
- Sexual intercourse under pretext of treatment (MCL 750.90).
- First-degree home invasion (MCL 750.110a(2)).
- First-degree child abuse and involvement in child sexually abusive activity or material (MCL 750.136b(2) and 750.145c).
- Burglary with explosives; sending explosives with intent to injure; sending a device represented as explosive; placing explosives with intent to destroy; aiding and abetting in the placing of explosives; possessing bombs, with unlawful intent; and manufacturing explosives with unlawful intent (MCL 750.112, 750.204-750.209, and 750.211).
- Making or possessing a device designed to explode upon impact or with the application of heat or a flame (MCL 750.211a).
- Malicious threats to extort money (MCL 750.213).
- First- or second-degree murder; causing a death as a result of fighting a duel; manslaughter; willful killing of an unborn quick child; causing a death due to explosives; and causing a death when a firearm is pointed intentionally, though without malice (MCL 750.316, 750.317, 750.319, 750.321, 750.322, 750.327, 750.328, and 750.329).
- Kidnapping; a prisoner taking another as a hostage; and kidnapping a child under 14 years of age (MCL 750.349, 750.349a, and 750.350).
- Mayhem (MCL 750.397).
- Aggravated stalking (MCL 750.411i).
- Disarming a peace officer (MCL 750.479b).
- First-, second-, third-, or fourth-degree CSC and assault with intent to commit CSC (MCL 750.520b-750.520e, and 750.520g).
- Armed robbery; unarmed robbery; and robbery of a bank, safe, or vault (MCL 750.529-750.531).
- Carjacking (MCL 750.529a).
- Felonious driving (MCL 752.191).
- Riot; incitement to riot; rioting in a State correctional facility; and unlawful assembly (MCL 752.541-752.543).
- Any offense not listed above that is punishable by imprisonment for life (which includes, for instance, attempted murder, a second CSC offense, some conspiracy violations, and certain habitual offender violations).
- An attempt, conspiracy, or solicitation to commit an offense listed above or a life-maximum offense.

Under the bill, "prisoner subject to disciplinary time" will mean prisoners sentenced for those crimes on or after December 15, 1998. The term will be expanded to include prisoners sentenced to an indeterminate term of imprisonment for any other crime committed on or after December 15, 2000.

The bill also repeals Enacting Section 2 of Public Acts 217 and 218 of 1994. Those enacting sections specify that the disciplinary time provisions will take effect on the date that sentencing guidelines are enacted into law after the Michigan Sentencing Commission submits its report to the Legislature.

House Bill 5398

Disciplinary Time

The DOC law, under the truth-in-sentencing provisions enacted in 1994, provides for prisoners subject to disciplinary time to serve at least their minimum sentence plus any accumulated disciplinary time before becoming eligible for parole. House Bill 5398 removes "plus disciplinary time" from several parole provisions in the DOC law. The bill specifies, instead, that a parole eligibility report must include a statement of all disciplinary time submitted for the parole board's consideration pursuant to Senate Bill 826.

The House bill also deletes language providing for the DOC law's disciplinary time provisions to take effect beginning on the date that sentencing guidelines are enacted into law after the Sentencing Commission submits recommended guidelines to the Legislature.

Access to Records

The bill specifies that the governing bodies of the Senate and House Fiscal Agencies will have access to all DOC records relating to individuals under the Department's supervision including, but not limited to, records contained in basic information reports and in the corrections management information system, the parole board information system, and any successor databases.

Records will not be accessible, however, if the DOC determines that any of the following apply:

- Access is restricted or prohibited by law.
- Access could jeopardize an ongoing investigation.
- Access could jeopardize the safety of a prisoner, employee, or other person.
- Access could jeopardize the safety, custody, or security of an institution or other facility.

Records that are to be accessed, and the manner of access, must be determined under a written agreement entered into jointly between the governing board of the Senate Fiscal Agency, the governing committee of the House Fiscal Agency, and the Department of Corrections. The agreement must ensure the confidentiality of accessed records.

Major Controlled Substance Offenses: Parole

The bill includes provisions relating to parole for persons sentenced for manufacturing, creating, delivering, or possessing with intent to deliver 650 grams or more of a mixture containing a Schedule 1 or 2 narcotic or cocaine. These provisions are identical to language in Senate Bill 281 (Public Act 314 of 1998).

House Bill 5419

Overview

The bill added Chapter XVII to the Code of Criminal Procedure to do all of the following:

- Classify over 700 criminal offenses into nine crime classes and six categories.
- Provide for the classification of some attempted crimes.
- Include instructions for scoring sentencing guidelines, including the application of 19 different offense variables and seven different prior record variables.
- Outline sentencing grids, with various recommended minimum sentence ranges, for each of the nine crime classifications.

The bill also does all of the following:

- Requires the imposition of statutory mandatory minimum sentences, regardless of a sentencing guidelines-recommended minimum sentence.
- Sets the longest allowable minimum sentence at two-thirds of the statutory maximum sentence (which codifies the "Tanner Rule").
- Provides for intermediate sanctions when a person's recommended minimum sentence range does not exceed 18 months.
- Provides for the Sentencing Commission to make recommended modifications to the sentencing guidelines.
- Requires the DOC to operate a jail reimbursement program to house in county jails prisoners who otherwise would have been sentenced to prison.

Crime Classification

The bill classifies over 700 crimes in the Michigan Compiled Laws into nine different classes of descending severity. (According to the Sentencing Commission's report, Classes A through H include

crimes for which the following maximum sentences may be appropriate:

Class	Sentence
A	Life imprisonment
B	20 years' imprisonment
C	15 years' imprisonment
D	10 years' imprisonment
E	5 years' imprisonment
F	4 years' imprisonment
G	2 years' imprisonment
H	jail or other intermediate sanctions

Class M2 is a separate classification for the offense of second-degree murder.

The crimes to which the bill's sentencing guidelines apply also are divided into six categories: crimes against a person; crimes against property; crimes involving a controlled substance; crimes against public order; crimes against public trust; and crimes against public safety. The bill specifies, however, that the offense descriptions are for assistance only, and that the listed statutes govern the application of the sentencing guidelines.

Attempted Crimes

The bill's sentencing guidelines apply to an attempt to commit an offense listed in Chapter XVII only if the attempted violation is a felony. The sentencing guidelines structure does not apply, however, to an attempt to commit a Class H offense.

For an attempt to commit an offense listed in Chapter XVII, the offense category (e.g., crime against a person) is the same as the attempted offense. An attempt to commit an offense listed in Chapter XVII is classified as follows:

- Class E, if the attempted offense is in Class A, B, C, or D.
- Class H, if the attempted offense is in Class E, F, or G.

If an offender is being sentenced for an attempted felony included in the sentencing guidelines structure, the judge must determine the offense variable level based on the underlying attempted offense.

Scoring

General. The bill includes instructions for scoring sentencing guidelines. For an offense listed in Chapter XVII, a judge must determine the recommended minimum sentence range by finding the offense category for the listed offense. From the variables spelled out in the bill, the judge then is to determine the offense variables to be scored for that offense category and score and total only those offense variables. The judge also must score and total all prior record variables for the offense, as provided in the bill. Then, using the offense class, the judge is required to use the sentencing grid included in the bill to determine the recommended minimum sentence range from the grid's intersection of the offender's offense variable level and prior record variable level. The bill shows the recommended minimum sentence within a sentencing grid as a range of months or life imprisonment.

Multiple Offenses and Habitual Offenders. If the defendant is convicted of multiple offenses, each offense must be scored.

If the offender is being sentenced under the Code of Criminal Procedure's habitual offender provisions, the judge must determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, the upper limit of the range determined under the bill's grid is to be increased as follows:

- By 25%, if the offender is being sentenced for a second felony.
- By 50%, if the offender is being sentenced for a third felony.
- By 100%, if the offender is being sentenced for a fourth or subsequent felony.

The bill specifies that a conviction may not be used to enhance a sentence under the Code's traditional habitual offender provisions if the conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under the habitual offender provisions.

Crime Categories. For all crimes against a person, offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 19 must scored. Offense variables 5 and 6 are to be scored for homicide or attempted homicide. Offense variable 16 is to scored for a home invasion offense. Offense variables 17 and 18 are to be scored if an element of the offense or attempted offense involves the operation of a vehicle, vessel, aircraft, or locomotive.

For all crimes against property, offense variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, and 19 must be scored.

For all crimes involving a controlled substance, offense variables 1, 2, 3, 12, 13, 14, 15, and 19 must be scored.

For all crimes against public order and all crimes against public trust, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 must be scored.

For all crimes against public safety, offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19 must be scored. If an element of the offense involves the operation of a vehicle, vessel, aircraft, or locomotive, offense variable 18 is to be scored.

Offense Variables

The bill identifies each of the 19 offense variables and assigns various points to be scored depending on whether and how the offense variable applies to the particular violation. The offense variables are as follows:

1 - Aggravated use of a weapon.
2 - Lethal potential of the weapon used.
3 - Physical injury to a victim.
4 - Psychological injury to a victim.
5 - Psychological injury to a member of a victim's family.
6 - Offender's intent to kill or injure another individual.
7 - Aggravated physical abuse.
8 - Asportation or captivity.
9 - The number of victims.
10 - Exploitation of a vulnerable victim.
11 - Criminal sexual penetration.
12 - Contemporaneous felonious criminal acts.
13 - Continuing pattern of criminal behavior.
14 - The offender's role.
15 - Aggravated controlled substance offenses.
16 - Property obtained, damaged, lost, or destroyed.
17 - Degree of negligence exhibited.
18 - Operator ability affected by alcohol or abuse.
19 - Threat to the security of a penal institution or court, or interference with the administration of justice.

Prior Record Variables

The bill identifies seven prior record variables and assigns various points to be scored depending on whether and how a prior record variable applies to a particular violation. In scoring prior record variables 1 through 5, a conviction or juvenile adjudication may not be used if it precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

Prior record variable 1 is "prior high severity felony convictions", which includes a conviction for a crime listed in offense class M2, A, B, C, or D. Prior record variable 2 is "prior low severity felony convictions", which includes a conviction for a crime listed in offense class E, F, G, or H.

Prior record variable 3 is "prior high severity juvenile adjudications", which includes a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D, if committed by an adult. Prior record variable 4 is "prior low severity juvenile adjudications", which includes a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H, if committed by an adult.

Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications; prior record variable 6 is relationship to the criminal justice system; and prior record variable 7 is subsequent or concurrent felony convictions.

Sentencing Grids

The bill contains a grid of minimum sentencing ranges for each class of offenses (M2 and A through H). The appropriate minimum sentencing range is to be determined by scoring the offense variable point level on one axis of the grid and the prior record variable point level on the other axis, and then finding the intersecting cell of the grid.

For each offense class, the bill specifies the lowest minimum sentence cell range (for 0 offense variable points) through the highest minimum sentence cell range (for 75 or more points), as follows:

Offense Class	Lowest Range (months)	Highest Range (months)
M2	90-150	365-600, or life
A	21-35	270-450, or life
B	0-18	117-160
C	0-11	62-114
D	0-6	43-76
E	0-3	24-38
F	0-3	17-30
G	0-3	7-23
H	0-1	5-17

Sentencing

Mandatory Minimums. The bill specifies that if a statute mandates a minimum sentence, the court must impose sentence in accordance with that statute, and that imposing a statutory mandatory minimum sentence is not considered a departure from the sentencing guidelines' minimum sentence

range. (As already provided, a court may depart from the appropriate sentence range established under the guidelines if the court has a substantial and compelling reason for the departure.)

"Tanner Rule". The bill prohibits a court from imposing a minimum sentence, including a departure from the sentencing guidelines' minimum sentence range, that exceeds two-thirds of the statutory maximum sentence. (This codifies the "Tanner Rule", established by case law, which sets two-thirds of a maximum sentence as the longest minimum sentence allowed in Michigan's indeterminate sentencing system.)

Intermediate Sanctions. Under the Code, if the upper limit of the minimum sentence under statutory sentencing guidelines enacted after the Sentencing Commission submits its recommendations is 18 months or less, the court must impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the Department of Corrections. (The Code defines "intermediate sanction" as probation or any sanction, other than imprisonment in a State prison or State reformatory, that may lawfully be imposed; including, for example, drug treatment, mental health treatment, jail, community service, or electronic monitoring.) The bill specifies that an intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

The bill also provides that if the offense is for manufacturing, delivering, possessing with intent to deliver, or possessing a mixture that contained less than 50 grams of a Schedule 1 or 2 narcotic or cocaine, and the upper limit of the recommended minimum sentence range is 18 months or less, the court must impose a sentence of life probation, absent a departure from the guidelines' minimum sentence range.

In addition, if an attempt to commit a Class H felony is punishable by imprisonment for more than one year, the court is required to impose an intermediate sanction upon conviction of that offense, absent a departure from the guidelines' minimum sentence range.

If the upper limit of the guidelines' recommended minimum sentence exceeds 18 months and the lower limit of the minimum sentence range is 12 months or less, the court must sentence the offender, absent a departure from guidelines' minimum sentence range, to either imprisonment with a minimum term within that range or an intermediate sanction that may include a term of imprisonment of not less than the minimum range or more than 12 months.

Sentencing Commission

The bill revises provisions of the Code that created the Michigan Sentencing Commission and specify its responsibilities. The bill charges the Commission with developing recommended modifications to the sentencing guidelines, rather than developing the recommended guidelines themselves.

The bill also deletes the Code's schedules for the Commission to develop and submit recommended sentencing guidelines, to submit revised guidelines if the Legislature failed to enact the recommended guidelines within a specified period, and to submit subsequent modifications to enacted guidelines. The bill also revises the schedule for the Commission to submit any recommended modifications to enacted sentencing guidelines. The Code's provisions that created the Sentencing Commission specify that modifications may not be recommended sooner than two years after the sentencing guidelines' effective date, unless based on omissions, technical errors, changes in law, or court decisions. The bill prohibits modifications before January 1, 2001, with the same exceptions.

The bill requires the Commission to submit recommended modifications to the Secretary of the Senate and the Clerk of the House of Representatives. If the Legislature fails to enact the modifications within 60 days after introduction of a bill to enact them, the Commission is to revise the recommended modifications and resubmit them to the Secretary and the Clerk within 90 days. Until the Legislature enacts modifications, the Sentencing Commission is to continue to revise and resubmit the modifications under this schedule.

Jail Reimbursement Program

The bill requires the DOC to operate a jail reimbursement program to provide funding to counties for housing in county jails offenders who otherwise would have been sentenced to prison. Criteria for reimbursement, including but not limited to determining the offenders who otherwise would have been prison-bound, and the rate of reimbursement must be established in the annual DOC appropriations acts.

MCL 800.34 & 800.35 (S.B. 826)
791.207a et al. (H.B. 5398)
769.8 et al. (H.B. 5419)

BACKGROUND

Indeterminate Sentencing and Disciplinary Credits

Under Michigan's indeterminate sentencing system, a sentencing judge sets minimum and maximum terms to be served. Maximum terms for criminal offenses are dictated by statute, while, typically, the minimum term is determined from a range suggested by the use of Supreme Court sentencing guidelines, which weigh various factors pertaining to the facts of the case and the criminal history of the offender. (A judge may depart from guidelines and order a minimum term greater or less than that suggested by the guidelines, but must state on the record his or her reasons for doing so.) Under a controlling 1972 opinion of the Michigan Supreme Court, the minimum sentence imposed by a judge cannot be more than two-thirds of the maximum term of imprisonment (*People* v *Tanner*, 387 Mich 683).

The actual amount of time that an offender is incarcerated is a function of the minimum sentence imposed and several other factors. Under Michigan statute, a minimum sentence may be reduced by the accumulation of disciplinary credits awarded to prisoners. A prisoner is eligible to earn a disciplinary credit of five days for each month served without a major misconduct violation, plus an additional two days per month awarded for good institutional conduct. If a prisoner does commit a major misconduct, previously awarded credits may be revoked. Although this system of awarding disciplinary credits replaced an earlier and more generous sentence reduction system that awarded "good time" credits, some prisoners who were incarcerated before that change apparently continue to receive good time credits or a combination of disciplinary credits and good time credits.

A prisoner is eligible for parole upon serving his or her minimum sentence less any accumulated disciplinary credits and/or good time credits, which is known as the prisoner's earliest release date. Even before parole eligibility, however, a prisoner who meets various criteria may be placed in a community corrections facility up to two years before his or her earliest release date. Assaultive offenders, however, may not receive community placement until 180 days before the expiration of their minimum terms.

Truth-in-Sentencing

Public Acts 217 and 218 of 1994 enacted the truth-in-sentencing provisions in the Department of Corrections law and the prison code, respectively (subject to the enactment of sentencing guidelines). Although these provisions have been amended by Senate Bill 826 and House Bill 5398, as described above, most of the original provisions will take effect on December 15, 1998. A brief overview of these provisions follows.

In addition to establishing disciplinary time for enumerated offenses, Public Act 217 provides that a prisoner subject to disciplinary time and committed to the DOC's jurisdiction must be confined in a "secure correctional facility" for the duration of his or her minimum sentence.

Parole may not be granted to a prisoner subject to disciplinary time until he or she has served the minimum term imposed by the court. This does not apply to prisoners who are eligible for and successfully complete a special alternative incarceration (boot camp) program, since these prisoners must be paroled upon certification of program completion.

An order of parole for a prisoner subject to disciplinary time may contain a condition requiring the parolee to be housed in a community corrections center or a community residential home for at least the first 30 days, but not more than the first 180 days, of the term of parole. (This parole condition originally was mandatory, but House Bill 5398 made the provision permissive.)

If a prisoner subject to disciplinary time is sentenced to consecutive terms of imprisonment, he or she will come under the jurisdiction of the parole board only after serving the total time of the added minimum terms. The prisoner's maximum terms must be added to compute the new maximum term, and discharge may be issued only after the total maximum term is served, unless parole is granted and completed satisfactorily.

A prisoner subject to disciplinary time will not be eligible for an extension of the limits of confinement (e.g., to work at paid employment or attend a training program) until after the prisoner has served his or her minimum term.

Under Public Act 218 of 1994, a prisoner subject to disciplinary time must receive disciplinary time for each major misconduct for which he or she is found guilty. A prisoner's minimum sentence, plus disciplinary time, may not exceed his or her maximum sentence.

The DOC may reduce any or all of a prisoner's accumulated disciplinary time if he or she has demonstrated exemplary good conduct during the term of imprisonment. Deducted disciplinary time

may be restored if the prisoner is found guilty of a major misconduct.

The DOC must promulgate rules to prescribe the amount of disciplinary time for each type of major misconduct.

People v Milbourn

In the *Milbourn* decision, the Michigan Supreme Court adopted a new standard for reviewing trial courts' imposition of criminal sentences. In a 1983 case, *People* v *Coles* (417 Mich 523), the Court had held that sentences were subject to review by Michigan's appellate courts and that the standard for determining whether a particular sentence represented an abuse of judicial discretion was whether the sentence "shocks the conscience" of the appellate court.

In 1990, the *Milbourn* court reaffirmed the 1983 finding that criminal sentences are subject to appellate review, but rejected the earlier "shocks the conscience" standard in favor of assessing a "principle of proportionality". The Court opined that the broad spectrum of criminal penalties in Michigan law reflects this concept (i.e., "...sentences are proportionate to the seriousness of the matter for which punishment is imposed"). In adopting this standard for appellate review of criminal sentences, the *Milbourn* Court ruled that "...a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences...to be proportionate to the seriousness of the circumstances surrounding the offense and the offender".

The Court described its administratively ordered use of sentencing guidelines as a "barometer" for determining appropriate sentencing practices, but it chose not to order strict compliance with the guidelines by trial courts: "...because our sentencing guidelines do not have a legislative mandate, we are not prepared to require adherence to the guidelines". The Court suggested that requiring strict adherence to the guidelines would prevent their "evolution". Thus, the Court specifically authorized trial courts to depart from the guidelines "when, in their judgment, the recommended range under the guidelines is disproportionate...to the seriousness of the crime".

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The judicially established sentencing guidelines were inadequate and needed to be replaced. The Legislature recognized this in 1994 when it passed Public Act 445, which created the Michigan Sentencing Commission and charged it with developing recommendations for a comprehensive statutory sentencing guidelines structure. The judicial guidelines reportedly incorporated only about 100 offenses, and were designed to reflect past sentencing practices, rather than representing an established public policy regarding criminal sentencing. The Sentencing Commission completed its recommendations and reported them to the Legislature. The recommendations essentially have been incorporated into House Bill 5419. (The bill, however, includes more offenses than were included in the Sentencing Commission's report, it treats prior juvenile adjudications differently than was recommended by the Commission, and it includes shorter sentence ranges in many of the sentencing grids' cells.)

The judicial sentencing guidelines system had been called descriptive rather than prescriptive. It made no public policy statement about how certain types of offenders ought to be punished, but tried to ensure that they were handled in roughly the same manner as similar offenders typically were treated in the past. Although the Michigan Supreme Court, in *Milbourn*, called the guidelines "an invaluable tool" for gaging the seriousness of an offense by a particular offender, the Court declined to require strict adherence to the guidelines due to the lack of a legislative mandate. The system recommended by the Sentencing Commission and, with modifications, enacted by House Bill 5419, is a result of such a mandate. The new system reflects an aim to treat violent offenders and repeat property offenders more severely than other criminals. The bill makes a clear declaration of public policy on the issues of crime and punishment. A rational and comprehensive system of sentencing guidelines will ensure that justice is served, bias is removed from decision-making, and limited prison and jail resources are used to their best advantage, that is, to house the worst offenders.

Under the classification and grid system enacted by House Bill 5419, barring a judicial departure from the recommended minimum sentence range, offenders in Classes M2 and A must receive a prison sentence. Class B and C offenders very likely will receive a prison sentence. Offenders in lower classes are more likely to receive an intermediate sanction rather than prison time. In addition, and in compliance with the directive in

Public Act 445 to the Sentencing Commission, House Bill 5419 requires a court to impose an intermediate sanction rather than a prison sentence if the upper limit of a recommended minimum sentence range is 18 months or less. This sentencing structure reflects a philosophy of ensuring that violent and repeat offenders are to be treated more harshly than other offenders. Sentencing practices, then, will be more proportionate to both the seriousness of the offense and the offender's prior criminal record. This, in turn, will provide for greater protection of the public.

Supporting Argument

While there has in the past been some concern over whether sentencing guidelines are within the proper purview of the Legislature, any lingering doubts surely were answered by the Michigan Supreme Court's discussion in *People* v *Milbourn.* In a decision that changed the appellate court standard for reviewing a trial court's sentence, the Court expressed reluctance to require strict adherence to judicial sentencing guidelines because those guidelines did not have a legislative mandate. The Court also noted that departures would be appropriate when guidelines did not adequately account for important factors legitimately considered at sentencing, and that to require strict adherence would effectively prevent the guidelines' evolution. By its suggestion that statutory guidelines are needed and its reluctance to require lower court compliance with the Supreme Court guidelines, the Court's decision in *Milbourn* may have eliminated, for all practical purposes, the effectiveness and enforceability of the judicially implemented sentencing guidelines. (In fact, since House Bill 5419 was enacted, the Supreme Court issued an administrative order rescinding the judicially promulgated sentencing guidelines for all crimes, effective January 1, 1999.) Legislatively enacted sentencing guidelines have been urgently needed to ensure the proportionality in sentencing that was advocated by the *Milbourn* Court, and to promote consistent sentencing practices. Effective statutory guidelines also are needed to prevent disparities in sentencing based on race, ethnicity, local attitudes, and individual bias.

Supporting Argument

Truth-in-sentencing is essential to improving public confidence in the criminal justice system and to providing greater protection to the public. All too often, crimes are committed by felons who still would be in prison if they had to serve the minimum sentence for previous offenses in secure confinement. If a judge sentences a felon to five-to-10 years in prison, it stands to reason that he or she should serve at least five years behind bars. By incapacitating a dangerous offender for at least the duration of his or her minimum sentence, the bills will help protect potential future victims and extend to past victims the peace of mind of knowing that the criminal is confined.

In addition, the deterrent value of criminal sanctions likely will be enhanced by the bills' assurances of meaningful punishment. Knowing that they will have to be incarcerated for their entire minimum sentence and that no system of sentence reduction will apply, some people might avoid criminal activity. Although correctional costs may increase as some criminals serve longer periods in prison, those costs are insignificant compared with the societal costs of crime, which the bills will mitigate. Giving effect to the 1994 truth-in-sentencing provisions will help both to restore integrity, credibility, and accountability to the criminal justice system, and to fulfill the system's most important objective: the protection of the public.

Response: The truth-in-sentencing provisions are unnecessary, because options to deal with criminals' serving insufficient time in prison are currently available in law. Problems with some offenders' serving too little time often have to do more with charging and sentencing than with any perceived defects in the disciplinary credit system. Prosecutors decide what charges to bring against an accused criminal, and plea bargaining often results in less severe penalties than may be appropriate for the offense committed. Further, prosecutors have the discretion to seek habitual offender status for anyone with a prior felony conviction, but this option is rarely used. Someone sentenced as a habitual offender must serve his or her minimum term and is subject to a higher maximum term.

In addition, more severe penalties do not discourage people from committing crimes because criminals generally do not believe they will be caught. Certainty and swiftness of punishment are more likely than length of sentence to deter criminal activity.

Supporting Argument

The disciplinary credit system is both confusing and misleading, and should be abandoned. Due to sentencing reductions and the practice of placing convicted criminals in community settings before they are actually paroled, it is difficult, if not impossible, for courts and prosecutors accurately to inform victims exactly how long a criminal offender will be imprisoned. The truth-in-sentencing provisions replace this convoluted system with a simple policy: that a convicted

criminal will serve, at a minimum, the minimum sentence imposed by a judge. Unlike the current system, this straightforward approach is reasonable, credible, and understandable.

Response: The disciplinary credit system actually *is* effective, simple, and straightforward. For persons sentenced after April 1, 1987, when the disciplinary credit system was expanded to cover almost all prisoners, five-to-seven days of credit are awarded for each month of a sentence. Credits can be withheld or revoked for misconduct. A prisoner's earliest release date is routinely calculated by the Department of Corrections and this information can easily be determined and announced at the time of sentencing. Such a requirement, which reportedly has been adopted by New Jersey courts, surely would constitute "truth-in-sentencing" without dismantling an effective prisoner management system.

Opposing Argument

House Bill 5419 may unduly interfere with the discretion of the judicial branch to deal with individual circumstances. Although departures from sentencing guidelines are allowed under the bill, they are limited to cases that present "substantial and compelling" reasons. Generally, to the extent that the bill limits judicial discretion, it places sentencing power in the hands of prosecutors through the exercise of prosecutorial discretion over how offenders are charged. Sentencing decisions are best left where they belong: in the hands of impartial judges.

Response: The unrestrained exercise of judicial discretion can lead to sentencing practices that vary from county to county and court to court, and open avenues for personal bias or philosophical differences to influence sentencing decisions. Sentencing guidelines will remove bias and make sentencing more uniform by quantifying offense and offender characteristics on a consistent basis and applying those standards statewide. House Bill 5419 accommodates individual circumstances by allowing the guidelines' recommended sentence ranges to be set aside for substantial and compelling reasons, subject to review by appellate courts.

Further, the *Milbourn* Court's comments regarding judicial sentencing discretion under the judicially developed sentencing guidelines system continue to apply under House Bill 5419: "...the discretion of trial courts adhering to the guidelines is not unduly restricted, since the recommended sentence range in a given cell of the guidelines is generally quite broad". In any event, setting sentences is a proper function of the Legislature. As Justice Boyle pointed out in her dissent in *Milbourn*, Article IV, Section 45 of the Michigan Constitution "...gives the Legislature the authority to provide for sentencing, a power which the people gave to that department [sic] of government. Pursuant to that authority, the Legislature enacted statutes which set the maximum punishment and gave the authority to set the minimum punishment to the trial court judiciary."

Opposing Argument

House Bill 5419 will require the use of intermediate sanctions, including jail and noninstitutional sanctions, for offenders with sentencing guideline recommended minimum sentences of 18 months or less. This suggests that more felons will have to be dealt with locally. Without adequate funding and support from the State, the bill may exacerbate problems for already overburdened jails and alternative programs.

Response: While the bill does not explicitly include any local funding, it does include a provision for State reimbursement to counties for the costs of housing individuals in county jails. The amount and criteria for this reimbursement are to be established annually in the Department of Corrections appropriations act.

Opposing Argument

Inappropriate sentences will result from applying the same factors more than once. Since the guidelines themselves take criminal history into account, the justice of also applying habitual offender sentence enhancement is debatable. House Bill 5419 provides for the sentences of second, third, and fourth repeat offenders to be lengthened by 25%, 50%, and 100% respectively. In addition, the prior record variable axis of the sentencing grids expands the recommended minimum sentence range for each class of crime. Moreover, the decision as to whether the prior record will be counted twice is left exclusively to the prosecutor, who decides whether to charge an individual as a habitual offender. While an offender's prior record should be considered when the recommended sentence range is determined, the existing habitual offender provisions should not apply when the offender's sentence is based in part upon consideration of prior offenses.

Response: It would be extreme to make such changes in the way habitual offenders are dealt with in Michigan's criminal justice system. Indeed, prior record variables have been used in judicially established sentencing guidelines, while habitual offender provisions also have been applied. Strong habitual offender enhancements continue to be necessary to punish and incapacitate career criminals adequately.

Opposing Argument

The bills fail to consider adequately the acute problem of prison and jail crowding. Guidelines developed without proper regard for correctional capacity not only may worsen the crowding situation, but also may fail to ensure that limited prison and jail beds are used for the worst offenders. There have been wide-ranging estimates of the impact of the sentencing guidelines, in conjunction with truth-in-sentencing provisions, with some suggesting that as many as eight-to-10 new prisons may be necessary. Other estimates, taking into account the restrictive nature of the parole board in recent years, project even greater growth in the prison population and the need for correctional facilities over the next decade.

Response: To delay the implementation of sentencing guidelines and truth-in-sentencing provisions because of potential prison and jail crowding would defeat the goals of justice and public safety. Criminals whose offenses and criminal backgrounds warrant incarceration should be incarcerated; their sentences should be those called for by the severity of their crimes and their prior offenses, not by the severity of the State's problems with the corrections budget. If the guidelines mean that more criminals spend more time in prison, public safety will be served. If this means that more prisons must be built, then those projects should be undertaken. It is time to put an end to the revolving door policy for prisons and time to force criminals to face the punishment they deserve.

Further, many of the more extreme estimates of an increase in prison population were based in whole or in part on earlier versions of the sentencing guidelines and truth-in-sentencing bills. The enacted version of the legislation incorporates changes that will mitigate some of the impact on prison population, including lowering the sentencing ranges in many cases. In addition, other enacted bills will help to lower prison populations; House Bill 4065 and Senate Bill 281, for example, revise the penalty and provide for parole eligibility for controlled substance offenses involving at least 650 grams.

Opposing Argument

Denying disciplinary credits to prisoners will hinder the effective management of prisons. The reward of sentence reductions provides prisoners with significant incentive to stay out of further trouble while incarcerated. Replacing this "carrot" with the "stick" of potential added prison time for misconduct will be less effective in controlling prisoners' behavior.

Response: There should be little, if any, difference in the psychological impact of possible disciplinary time versus disciplinary credits. One of the problems with the disciplinary credit system is that the credits seem to be awarded automatically, and may be lost for misconduct. This, essentially, takes the same philosophical approach as the disciplinary time penalty, but without reducing a prisoner's sentence from what was imposed by the judge. (That is, time may be added in the form of denied parole for misconduct.) The award of disciplinary credits is so routine that some have characterized the policy as a means of reducing correctional costs and demand for prison beds, rather than as a system employed to induce and reward good behavior. The disciplinary time approach is more consistent with the idea of punishing criminals for their actions: They will have to serve their minimum sentence, while parole may be delayed due to accumulated disciplinary time.

Opposing Argument

By eliminating disciplinary credits, the bills will require prisoners who have not misbehaved during imprisonment to serve longer terms, while not affecting habitual offenders, lifers, or major drug offenders, since those offenders have not been eligible to receive disciplinary credits. The bills' major effect, then, is to punish the best behaved prisoners--those who have been eligible for credits and serve their time free of major misconduct violations. Even under the disciplinary credit system, prisoners who misbehave can be imprisoned for up to the length of their maximum sentence, so the truth-in-sentencing provisions will be no tougher on them.

Opposing Argument

As originally enacted in 1994, the truth-in-sentencing provisions not only would have eliminated sentencing reduction programs, such as the accumulation of disciplinary credits, but would have *required* that accumulated disciplinary time for prisoner misconduct be added to a person's minimum sentence in order to delay his or her parole eligibility. The bills change that system by requiring only that the parole board consider a prisoner's accumulated disciplinary time when determining whether to grant parole. This will not be adequate punishment for prisoners who misbehave while incarcerated. The 1994 provision for extending a prisoner's minimum term by the amount of disciplinary time earned should have been retained.

Response: The system enacted in 1994 blurred the responsibilities of the executive and the judicial branches of government. Authorizing the DOC to increase a prisoner's minimum sentence through the imposition of DOC-determined

disciplinary time would have usurped judicial sentencing authority. In effect, a person's minimum sentence would have been determined not by the sentencing judge, but by the Department. Acts of prisoner misconduct do not necessarily amount to violations of law, so adding to a prisoner's sentence based on disciplinary time would lengthen a criminal sentence for acts that might not constitute crimes. In addition, mandating increased incarceration for prison infractions could deprive a person of his or her liberty without basic due process. Although there would have to have been a disciplinary hearing at which a prisoner could respond to charges and present evidence, there is no right to counsel in those administrative hearings and guilt need not be proved beyond a reasonable doubt.

Opposing Argument

Some have assumed that truth-in-sentencing will have little effect on actual time served, because judges and sentencing guidelines will merely adjust sentencing downward to accommodate the truth-in-sentencing provisions just as sentences presumably may have been adjusted upward to account for disciplinary credits. Under this reasoning, the bills do not represent "truth" in sentencing at all; rather they mislead crime victims and the public into believing that real change in time served will ensue.

Response: Truth-in-sentencing simply will ensure that a prisoner is incarcerated for at least the minimum term imposed by a judge.

Opposing Argument

Under the truth-in-sentencing provisions enacted in 1994, a prisoner who is subject to disciplinary time must be confined in a secure correctional facility for the duration of his or her minimum sentence. This requirement actually may lead to proposals for *shorter* minimum sentences for all criminal offenders. In 1972, when the Michigan Supreme Court established the Tanner Rule, under which a prisoner's minimum sentence can be no longer than two-thirds of the statutory maximum, it rejected the recommendation of the American Bar Association that a minimum sentence not exceed *one-third* of the maximum sentence. In setting Michigan's two-thirds standard, the Court considered Michigan's generous good time credits system and held that, in conjunction with the sentence reduction policy, the two-thirds rule adopted by the Court "fairly approximates the objective of the American Bar Association's minimum standards [for criminal justice]" (*People* v *Tanner*).

Some legal scholars reportedly have believed that, because of Michigan's elimination of good time credits in favor of the less generous disciplinary credit system, the Tanner Rule should be revised downward to a one-third standard, as recommended by the American Bar Association. A statutory requirement that denies any type of sentence reductions simply strengthens the argument that the Tanner Rule should be reduced to one-third of the statutory maximum sentence.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The recently enacted bills are designed to affect sentencing practices, resulting in a change in the characteristics of the prison population and the time served by prisoners in State prisons. As a result of limiting State prisons to offenders with minimum sentences greater than 18 months, the average minimum sentence of the State prison population should increase. On the other hand, offenders with minimum sentences less than 18 months should remain the responsibility of local government and increase the use of local jail and probation alternatives, referred to as intermediate sanctions. Several projections have estimated the impact on State prison population over 10 years, yet no single projection incorporates all of the enacted legislation in its estimate. Therefore, the fiscal impact of sentencing guidelines and truth-in-sentencing is indeterminate.

A recent projection incorporating work by Dr. Charles Ostrom of Michigan State University and Dr. James Austin of the National Council on Crime and Delinquency compared baseline prison population through the year 2007, with a projected population based on an earlier version of House Bill 5419 and the application of truth-in-sentencing to all prisoners. The projection shows a 1,323-prisoner increase over baseline by 2007 as a result of the legislation. However, the increase may be insignificant in terms of fiscal impact. Two reasons that the impact appears to be minimal are discussed below.

First, historically, population projections have been prepared for five-year periods by the Department of Corrections using a model similar to the one used for this projection. In the DOC projections, which have a three-year verification period, a 1,300-prisoner difference from actual population has occurred, and may be considered within the margin of error. The difference in actual population is generally observed because these models build upon assumptions and trend data. The assumptions and trends considered include, but are not limited to, the parole rate, the affects of legislation creating new crimes, and judicial

behavior. Once a trend changes or a new event occurs, the projections are no longer valid. An example of a new event is the *Young* decision in which a Recorder's Court judge ruled that parolees convicted of a second offense while on parole must serve the maximum sentence of the first crime before serving the minimum sentence of the second crime. It was assumed that second-offense parolees would serve long periods in prison, increasing the prison population. Instead, the number of parolees with second sentences dropped dramatically, and only began to increase to historic levels when the Court of Appeals overturned the *Young* ruling.

Second, a component of truth-in-sentencing, disciplinary time, must only be reported to the parole board, and not automatically added to the minimum sentence. The projection cited above assumes that all offenders will have to serve all disciplinary time and that, on average, prisoners will serve an additional 13% of their sentence beyond the minimum sentence for disciplinary infractions. The difference between accrued disciplinary time and actual time served will not be known until parole board decisions are made. The possibility that the parole board will not require prisoners to serve all of the accrued disciplinary time, could make the disciplinary time population neutral, and, therefore, make the fiscal impact on State government cost neutral, as well.

Fiscal Analyst: K. Firestone

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

ATTACHMENT B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATHRYN JANE HAUSER,

Defendant-Appellant.

UNPUBLISHED
October 29, 2002

No. 239688
Oakland Circuit Court
LC No. 2000-173663-FH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant pleaded no contest to causing death while operating a vehicle under the influence of a controlled substance, MCL 257.625(4), for which she was sentenced as an habitual offender, second offense, MCL 769.10, to seven to fifteen years in prison. She appeals her sentence by delayed leave granted. We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends on appeal that the trial court improperly scored offense variables 3 and 5. MCL 777.33; MCL 777.35. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott,* 215 Mich App 259, 260; 544 NW2d 748 (1996).

The statute applicable to this offense provided that 100 points were to be assessed for offense variable (OV) 3, but only if homicide was not the sentencing offense. MCL 777.33(1), (2)(b). The statute defined the term "homicide" to mean "any crime in which the death of a human being is an element of that crime." MCL 777.1(c). Because a person's death was an element of the crime charged, the court could not assess 100 points. However, the prosecutor argued, and the court agreed, that it could assess a lesser number of points based on injury to the victim. Defendant contends that the trial court misinterpreted the statute. We review an issue of statutory interpretation and application de novo on appeal. *People v Webb,* 458 Mich 265, 274; 580 NW2d 884 (1998).

The rules of statutory construction require the courts to give effect to the Legislature's intent. This Court should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses.

Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand), 217 Mich App 7, 12; 551 NW2d 199 (1996). If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135; 545 NW2d 642 (1996). Statutory language is to be given its ordinary and generally accepted meaning, although if the statute defines a given term, that definition is controlling. *Id.* at 135-136. "Statutory language should be construed reasonably, keeping in mind the objective and purpose of the act." *In re S R,* 229 Mich App 310, 314; 581 NW2d 291 (1998).

The court must "afford the statute an interpretation that achieves harmony between and among specific provisions to provide a reasonable meaning." *Messenger v Dep't of Consumer & Industry Services,* 238 Mich App 524, 533; 606 NW2d 38 (1999). "Furthermore, nothing will be read into a statute that is not within the manifest intent of the Legislature as gathered from the act itself." *In re S R, supra* at 314.

The statute in effect offered the following scoring options for OV 3: (a) 100 points if a victim was killed, (b) 25 points if a victim sustained a life-threatening or permanent incapacitating injury, (c) 10 points if a victim sustained bodily injury requiring medical treatment, (d) 5 points if a victim sustained bodily injury not requiring medical treatment, or (e) 0 points if a victim was not injured. MCL 777.33(1). The statute reflects a graduated scale for assessing the harm to the victim. Given that death is assessed the highest number of points and no injury at all is assessed no points, the plain and most reasonable meaning of the intervening sections is that they are meant to apply where there is some harm short of death. Otherwise, a death for which points cannot be assessed under subsection 33(2)(b) could be assessed points under subsections 33(1)(b), (c), or (d) if the victim died after sustaining some injury. If that were the intent of the Legislature, it would not have limited the assessment of points for a victim's death to those crimes in which death of a person is not an element, but would have eliminated subsection 33(2)(b) altogether.

This interpretation is supported by the October 2000 amendment of the statute. The amendment provides for additional points for causing death while operating under the influence, which offense would otherwise not be assessed any points. Because the victim did not survive the offense with serious injuries but died, the trial court erred in scoring OV 3.[1]

Defendant also contends that the court should not have assessed any points for OV 5. The statute authorized the assessment of fifteen points if a member of a homicide victim's family suffered "[s]erious psychological injury requiring professional treatment." MCL 777.35(1)(a). Fifteen points are also to be assessed "if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.35(2).

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[1] We note that because the guidelines, consistent with our opinion, will not take into account the victim's death, the trial court may have a valid reason for departing from the guidelines at resentencing. MCL 769.34(3).

The victim's daughter stated that she had trouble sleeping and had sought counseling and medication from her physician. While her psychological problems may have been a common reaction to the sudden loss of a loved one and may not have been so serious as to be debilitating, they were sufficient to support the scoring of OV 5. See *Elliott, supra* at 262; *People v Moseler,* 202 Mich App 296, 300; 508 NW2d 192 (1993).

Because the trial court erred in scoring OV 3 and correction of the error would result in a guidelines range below the minimum sentence imposed by the trial court, we remand for resentencing.

Remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL L. EDELEN,

Defendant-Appellant.

UNPUBLISHED
December 23, 2003

No. 242167
Genesee Circuit Court
LC No. 01-008646-FC

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for manslaughter, MCL 750.321, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a weapon, MCL 750.224f. We reverse and remand for resentencing.

Defendant first asserts that the court erred in scoring OV 3 and OV 7. A sentencing court has discretion in determining the number of points to be scored for a variable, provided that evidence on the record adequately supports a particular score. *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any evidence in support will be upheld on appeal. *Id.; People v Elliott,* 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 3 concerns physical injury to the victim. It provides for a score of 100 points if a victim is killed and homicide is not the sentencing offense. MCL 777.33(2)(b). It provides for a score of 35 points if death results from the commission of a crime and the elements of the offense involve the use of a vehicle under the influence or while impaired. MCL 777.33(2)(c). A score of 25 points is assessed if a life threatening or permanent incapacitating injury to the victim occurred. MCL 777.33(1)(c).

In *People v Hauser,* unpublished opinion per curiam of the Court of Appeals, issued 10/29/02 (Docket No. 239688), the Court found that where the victim died, the trial court erred in scoring OV 3 at 25 points for a homicide. The Court stated:

> The statute reflects a graduated scale for assessing the harm to the victim. Given that death is assessed the highest number of points and no injury at all is assessed no points, the plain and most reasonable meaning of the intervening sections is that they are meant to apply where there is some harm short of death. [Slip op, p 2].

Although *Hausner* is not precedential, we find its reasoning persuasive. The court erred in scoring OV 3 at 25 points. However, the court properly scored OV 7 at 50 points for excessive brutality. Where the error in scoring OV 3 did not affect the guidelines range, the error was harmless. *People v Mutchie,* 468 Mich 50; 658 NW2d 154 (2003); *People v Jarvi,* 216 Mich App 161; 548 NW2d 676 (1996).

Defendant also argues that the court abused its discretion in departing from the guidelines range. A sentencing court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for the departure, and states the reason on the record. MCL 769.34(3); *People v Hegwood,* 465 Mich 432, 438; 636 NW2d 127 (2001). The existence of a particular factor is a factual determination reviewed for clear error. *People v Babcock,* ___ Mich ___; 666 NW2d 231 (2003) slip op at 28. The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id.* The determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for abuse of discretion. *Id.,* 29.

Substantial and compelling reasons exist only in exceptional cases and reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Id.,* 27.

The victim's status as an immigrant was an objective and verifiable fact. However, the crime was unrelated to his status as an immigrant. The court seems to have found that the victim was a good man, and it increased the punishment based on that fact. This is not an objective and verifiable factor that would support a departure.

The court also relied on defendant's gang affiliation. Defendant testified that he had been a gang member, and he had a continued inactive connection with the gang. At the time of the shooting, he was wearing a bandana that was a symbol of the gang. While defendant's gang membership was objective and verified, there was no evidence that the crime was connected to gang activity.

The sentencing guidelines considered the fact that defendant was on probation at the time he committed the instant offense. However, the guidelines do not address the fact that defendant had violated probation in the past. This is an objective and verifiable factor. However, where one probation was already considered, and scored 10 points under PRV 6, a second probation violation does not seem to be a substantial factor.

The nature of the offense was already considered in OV 7, when the court scored the factor for excessive brutality. MCL 769.34(3)(b) provides that the court shall not base a departure on a characteristic already taken into account in determining the appropriate sentencing range unless the court finds from the facts that the characteristic has been given inadequate or disproportionate weight. The court made no reference to the scoring for OV 7 in its departure explanation, and did not make the required finding.

Finally, the court noted that defendant's trial testimony was not credible, and his lack of remorse reflects on his potential for rehabilitation. A trial court may properly consider a

defendant's lack of remorse, however this is a subjective factor, and cannot be a basis for departure.

The trial court relied largely on subjective factors and a factor already considered in the guidelines in making its departure decision. Under the circumstances presented, the trial court abused its discretion in exceeding the guidelines range.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Helene N. White

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE J. STANKO,

Defendant-Appellant.

UNPUBLISHED
January 27, 2004

No. 242876
Oakland Circuit Court
LC No. 2001-177228-FH

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a sentence of two-and-a-half to fifteen years' imprisonment for a conviction of operating under the influence of intoxicating liquor causing death, MCL 257.625(4). We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends on appeal that the trial court erred in scoring offense variables 3 and 6. MCL 777.33; MCL 777.36. "A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott,* 215 Mich App 259, 260; 544 NW2d 748 (1996).

The version of OV 3 applicable to this case provided that one hundred points were to be assessed for the death of the victim, but only if homicide is not the sentencing offense. MCL 777.33(1)(a), (2)(b). A homicide is defined as "any crime in which the death of a human being is an element of that crime." MCL 777.1(c). Because a person's death was an element of the crime charged, the court could not assess one hundred points. The prosecutor argued, and the court agreed, that it could assess twenty-five points because the victim sustained severe injury. Defendant challenges the court's interpretation of the statute. An issue of statutory interpretation and application presents a question of law that is reviewed de novo on appeal. *People v Webb,* 458 Mich 265, 274; 580 NW2d 884 (1998).

The rules of statutory construction require the courts to give effect to the Legislature's intent. This Court should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses. *Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand),* 217 Mich App 7, 12;

551 NW2d 199 (1996). If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135-136; 545 NW2d 642 (1996). "Statutory language should be construed reasonably, keeping in mind the objective and purpose of the act." *In re S R,* 229 Mich App 310, 314; 581 NW2d 291 (1998). Statutory language is to be given its ordinary and generally accepted meaning, although if the statute defines a given term, that definition is controlling. *Tryc, supra.* The court must "afford the statute an interpretation that achieves harmony between and among specific provisions to provide a reasonable meaning." *Messenger v Dep't of Consumer & Industry Services,* 238 Mich App 524, 533; 606 NW2d 38 (1999). "Furthermore, nothing will be read into a statute that is not within the manifest intent of the Legislature as gathered from the act itself." *S R, supra.*

The statute offered scoring options of one hundred points if the victim was killed, twenty-five points if the victim sustained a life-threatening or permanent incapacitating injury, ten points if the victim sustained an injury requiring medical treatment, five points if the victim sustained an injury that did not require medical treatment, and zero points if the victim was not injured. MCL 777.33(1). The statute reflects a graduated scale for assessing the harm to the victim. Given that death is assessed the highest number of points and no injury at all is assessed no points, the plain and most reasonable meaning of the intervening sections is that they are meant to apply where there is some harm short of death. Otherwise, a death for which points cannot be assessed under § 33(2)(b) could be assessed points under § 33(1)(b), (c), or (d) if the victim died after sustaining some injury. If that were the intent of the Legislature, it would not have limited the assessment of points for a victim's death to those crimes in which death of a person is not an element, but would have eliminated § 33(2)(b) altogether. This interpretation is supported by the October 2000 amendment of the statute which now permits an assessment of thirty-five points if death results from a drunk driving offense. The instant offense occurred on April 26, 2000, and was prior to the amendment of MCL 777.33, adding (2)(c), and which provides for the scoring of thirty-five points for the operation of a motor vehicle while under the influence or while impaired causing death.

The guidelines applicable to this case consider only death or survival short of death, not survival followed by death. Because the victim in this case did not survive the accident, the trial court erred in scoring OV 3.

The trial court originally assessed zero points for OV 6, MCL 777.36, indicating no intent to kill or injure and ten points for OV 17, MCL 777.47, indicating gross negligence. The prosecutor argued, and the court agreed, that that it could assess twenty-five points for OV 6 because defendant created a high risk of death or serious injury knowing that death or serious injury was the probable result of his actions. Defendant challenges the interpretation of this statute as well.

The statute offers scoring options of fifty points, twenty-five points, ten points, or zero points, depending on the defendant's "intent to kill or injure another individual." MCL 777.36(1). The options for which points are assessed correspond to the circumstances or intent necessary to make a killing first-degree murder, MCL 777.36(1)(a), second-degree murder, MCL 777.36(1)(b), or manslaughter, MCL 777.36(1)(c).

Operating under the influence of intoxicating liquor (OUIL) causing death is a general intent crime. *People v Lardie,* 452 Mich 231, 234, 256; 551 NW2d 656 (1996). The elements of the crime are similar to those for involuntary manslaughter, except that the prosecutor need not prove the element of gross negligence because it is presumed as a matter of law that driving while intoxicated constitutes gross negligence. *Id.* at 251, 259. Drunk driving alone does not establish the element of malice necessary for second-degree murder. There must be "a level of misconduct that goes beyond that of drunk driving." *People v Goecke,* 457 Mich 442, 464; 579 NW2d 868 (1998).

The trial court is required to score OV 6 "consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a). A score of ten points would be consistent with the jury's verdict because defendant was convicted of a crime in which gross negligence is presumed.[1] Whether the evidence was sufficient to support a finding of the intent necessary for second-degree murder cannot be determined because the parties stipulated to provide less than the full transcript, MCR 7.210(B)(1)(d), and, thus, the trial transcript is not available. Because there is no evidence in the record before this Court to support a finding of malice sufficient to support a conviction of second-degree murder, we find that the trial court erred in scoring OV 6 at twenty-five points.

Had the guidelines been properly scored, defendant would have zero points for OV 3, ten points for either OV 6 or OV 17, and ten points for OV 18 (the scoring of which was not disputed). An offense variable score of twenty points places defendant in the A-II category for which the minimum sentence range is zero to seventeen months. MCL 777.64. Because the upper limit is less than eighteen months, the trial court was required to impose an intermediate sanction unless it found a substantial and compelling reason to sentence defendant to prison. MCL 769.34(4)(a).

Because the trial court erred in scoring the guidelines and consequently did not impose a sentence within the applicable guidelines range and did not state on the record a substantial and compelling reason for departing from the guidelines, a remand for resentencing is required. MCL 769.34(10). The trial court may consider our unpublished opinion in *People v Hauser,* unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 239688).[2] In *Hauser* this Court noted that the guidelines prior to October 1, 2000, did not consider the fact that the victim died under circumstances similar to the instant matter. Death of a victim not considered by the guidelines is a factor that is objective and verifiable such, that upon proper articulation by the trial court, may be considered to determine if a substantial and compelling reason for upward departure exists. See *Hauser, supra.* Because the trial court sentenced defendant within the guidelines as it had calculated them and the sentence imposed

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[1] This degree of negligence is accounted for by OV 17, MCL 777.47, which the trial court originally scored at ten points. If any points are assessed under OV 6, ten points cannot be scored under OV 17. MCL 777.47(2). Therefore, the trial court may assess ten points under OV 6 and no points under OV 17, or ten points under OV 17 and no points under OV 6.

[2] We cite this case because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1).

was a result of the improper scoring of the guidelines rather than any prejudice or improper attitude toward defendant, resentencing by a different judge is not required. *People v Hegwood,* 465 Mich 432, 440-441 n 17; 636 NW2d 127 (2001).

Remanded for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN SMITH,

Defendant-Appellant.

UNPUBLISHED
May 20, 2003

No. 234830
Genesee Circuit Court
LC No. 00-006167-FC

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317,[1] possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to life imprisonment without parole for the murder conviction, and consecutive terms of two years' imprisonment for the felony-firearm conviction and two to five years' imprisonment for the concealed-weapon conviction. We affirm.

I. Ex Parte Communication with the Deliberating Jury

Defendant asserts that he is entitled to a new trial without any showing of prejudice because the trial court violated his constitutional rights to be present and to have the assistance of counsel at a critical stage in his criminal trial. Specifically, defendant relies on *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), and claims that the trial court's ex parte communication with the deliberating jury constitutes prejudice per se, warranting automatic reversal of his conviction. This issue presents a constitutional question that we review de novo. See *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

In this case, the alternate juror who was excused from serving on the jury informed the trial court of his understanding that defendant made a scene in the courtroom and shattered a window with his head. The trial court reconvened the jury to inform the jurors that the window was broken not by defendant, but by a different person unrelated to the case. The court requested the jury to put any question it may have in writing and stated that it had asked the lawyers not to be present at that time. In pertinent part, the court explained:

[1] Defendant was charged with open murder, MCL 750.316.

> I'll remind you that you make your decision based only on the evidence that was properly introduced from the witnesses and from the exhibits, and not from any rumors or things that you heard about, that happened outside of your presence. Okay?
>
> Now having said that, you may go back in there and continue your deliberations.

Defendant asserts that the *Cronic* decision renders the above communication with the jury as prejudice per se, requiring automatic reversal of his conviction. We disagree. As the Supreme Court explained in *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002):

> . . . [In *Cronic*,] we identified three situations implicating the right to counsel that involved circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."
>
> First and "most obvious" was the "complete denial of counsel." A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at "a critical stage," . . . a phrase we used . . . *to denote a step of a criminal proceeding*, such as arraignment, *that held significant consequences for the accused*. [*Bell, supra* (citations omitted) (emphasis added).]

Cronic does not discuss the issue of a trial court's communication with a deliberating jury nor does *Cronic* call for a strict rule for automatic reversal in circumstances that are not "likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic, supra,* 466 US 658-659. Rather, the Supreme Court emphasized how seldom "circumstances of that magnitude" arise that justify a court in presuming prejudice. *Id.*, at 550 n 26. Accordingly, the Court has encouraged the forgoing of particularized inquiry into whether a denial of counsel undermined the reliability of a judgment. See *Mickens v Taylor*, 535 US 162, 166; 122 S Ct 1237; 152 L Ed 2d 291 (2002); *Bell, supra*. The only Sixth Amendment violations that fit within this narrowly circumscribed class are those that are pervasive in nature, permeating the entire proceeding. See *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Cronic, supra*, 466 US 550 n 26.

Although defendant relies on federal case law in support of his argument, we will analyze this issue in the context of Michigan case law. Our Supreme Court, in *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990), has squarely addressed this issue and has rejected the strict rule requiring the automatic reversal of a conviction where the trial court contacted a deliberating jury without the presence of counsel.[2] The *France* opinion directs this Court to first categorize the nature of the trial court's communication as "substantive, administrative, or housekeeping," and then analyze "whether a party has demonstrated that the communication was prejudicial or that the communication lacked any reasonable prejudicial effect." *Id.* at 163. Prejudice is broadly defined as "any reasonable possibility of prejudice." *Id.* at 142. The

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[2] We reject defendant's claim that the decision in *France* was not grounded on the Sixth Amendment.

prosecutor may rebut the presumption of prejudice by showing that the instruction "was merely a recitation of an instruction originally given without objection, and that it was placed on the record." *Id.* at 163 n 34.

A substantive communication "encompasses supplemental instruction on the law given by the trial court to a deliberating jury." It carries a presumption of prejudice that may only be rebutted by a showing of an absence of prejudice. An administrative communication includes jury instructions "regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations." An administrative communication carries no presumption of prejudice and a defendant's failure to object when he is made aware of the communication will be taken as evidence that the instruction was not prejudicial. Upon an objection, the prosecutor must demonstrate that the communication lacked any prejudicial effect. Finally, a housekeeping instruction is one that occurs between a jury and a court officer over matters that are unrelated "in any way to the case being decided" such as meal orders or restroom facilities. *France, supra* at 143.

The Court stated that it left the classifications that were not enumerated in *France* to be decided on a case by case basis. *France, supra* at 143 n 4. In this case, the instruction clearly is not a housekeeping matter because it involved a communication related to the case being decided. It is not a substantive communication because it does not encompass supplemental instructions on the law. Rather, we conclude that it is an administrative communication because it rejected what the jurors may have erroneously considered as evidence and directed the jury to ground its deliberations and decision on only properly admitted evidence.

Next, we must determine "whether a party has demonstrated that the communication was prejudicial or that the communication lacked any reasonable prejudicial effect." *France, supra* at 163. In his reply brief on appeal, defendant claims that the communication was substantive and therefore, prejudicial per se. As discussed above, the communication was administrative and carried no presumption of prejudice. Accordingly, we consider defendant's failure to object when he became aware of the administrative communication as evidence that the instruction was not prejudicial.[3] *Id.* at 143. Moreover, we conclude that this communication served to guarantee defendant's right to a fair trial by ensuring that the jury consider only properly admitted evidence. Further, the communication was not a verbatim jury instruction, but it reflected the jury instruction that was originally given to the jury without objection.

II. Sentencing Guideline Scores

Defendant next argues that he is entitled to resentencing because the trial court improperly scored offense variables (OV) 3, 6, 9 and prior records variables (PRV) 5 and 6. Because the offense occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34.

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[3] We disagree with defendant's claim that there was no need to object because the communication constituted the last event in the jury trial. See *People v Carines*, 460 Mich 750, 764-765, 767, 774; 597 NW2d 130 (1999).

Defendant has failed to preserve this issue. A party may not challenge the scoring of the sentencing guidelines or the accuracy of the presentence report on appeal unless he raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002).[4] In this case, defendant did not object to the scoring of the variables below and he does not assert that he challenged the inaccuracies as soon as they could reasonably have been discovered. Therefore, this unpreserved issue will be reviewed for clear error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra.*

The prosecutor concedes that offense variable three was improperly scored at one hundred points. Defendant argues that OV 3 should be assessed at zero, while the prosecutor contends that it should be assessed at twenty-five. OV 3 provides that zero points are to be assigned when "[n]o physical injury occurred to a victim" and twenty-five points are to be assigned when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c) and (f). MCL 77.33(2)(b) prohibits assigning points for a resulting death when "homicide is not the sentencing offense." In this case, the victim was killed after defendant placed the victim under life threatening circumstances. We conclude that the correct score for OV 3 is twenty-five points.

Offense variable six was assessed at fifty points. This variable requires the trial court to assess fifty points when the offender had premeditated intent to kill. MCL 777.36(1)(a). Defendant argues that OV 6 should have been assessed at ten points, while the prosecutor concedes that this variable should be assessed at twenty-five points. MCL 777.36(1)(c) provides that ten points are to assessed when "the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life." MCL 777.36(b) provides that twenty-five points are to be assigned when the offender "had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." In this case, the evidence sufficiently showed that defendant had premeditated intent to kill when he departed from the location of the altercation with the victim, returned about ten minutes later with a gun, and showed it or pointed it at the victim before the fatal altercation occurred. The witnesses' testimony indicated that defendant was calm when he returned with the gun but that the victim again provoked defendant. The jury convicted defendant of second-degree murder. Accordingly, we conclude that OV6 would properly be assessed at twenty-five points.

[4] The statutory preservation provision, MCL 769.34(10), which prohibits a party from challenging the scoring of the guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless he raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court, MCL 769.34(10), conflicts with and is superseded by the court rule, *McGuffey, supra* at 165-166. But see *People v Wilson*, 252 Mich App 390, 399; 652 NW2d 488 (2002), where two of the three appellate judges in concurring opinions stated that *McGuffey* was wrongly decided because the statute should prevail over the court rule.

Offense variable nine requires the trial court to assess ten points when two to nine persons were placed "in danger of injury or loss of life as a victim." MCL 777.39(1)(c) and (2)(a). The evidence showed that at least nine persons were placed in danger of injury when defendant returned to the basketball gym with a gun and when he shot the victim. We conclude that this offense variable was properly assessed at ten points.

The prosecutor concedes that PRV 5 and 6 were improperly scored at two and five points respectively. The parties agree that the two variables are properly scored at zero each. Nonetheless, even with zero points for these two variables, defendant is still classified as a Level C. From the above, the total offense variables is 105 points. Therefore, the correct guideline range remains at 225-375 or life imprisonment. The trial court sentenced defendant to life imprisonment for the second-degree murder conviction. This is within the range of the correct guidelines. Defendant's sentence was proper.

III. Defendant's Supplemental Brief on Appeal

A. Imperfect Self-Defense Jury Instruction

Defendant argues that he was denied a fair trial because the trial court failed to sua sponte instruct the jury on the imperfect self-defense doctrine. Defendant failed to preserve this issue when he did not request a jury instruction relative to this doctrine. MCL 768.29; *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Where an alleged instructional error has not been preserved it is forfeited and appellate review is for plain error affecting substantial rights. *Carines, supra.*

Jury instructions in a criminal case must address each element of the offense charged, as well as defenses and theories of the parties that are supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Instructions that lack evidentiary support should not be given. *Id.* Defendant bears the burden of showing that as a result of the alleged error, when weighed against the facts and circumstances of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *Riddle, supra* at 124-125.

The doctrine of imperfect self-defense mitigates an act of second-degree murder to voluntary manslaughter by negating the element of malice. *People v Kemp*, 202 Mich App 318, 324; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). The doctrine applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor. *Id.* However, the Michigan Supreme Court has not recognized this doctrine. *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999). This Court has applied several limitations to the doctrine. First, the doctrine applies only where the defendant would have had a right to self-defense but for his or her actions as the initial aggressor. *People v Amos*, 163 Mich App 50, 57; 414 NW2d 147 (1987). Second, the defendant may not use more force than is necessary even if he honestly and reasonably believes his life to be endangered. *Kemp*, *supra*, at 325 n2.

Defendant's argument fails because the evidence does not support the doctrine. The evidence showed that defendant used excessive force in shooting the victim. Although able to retreat, defendant shot the unarmed victim and then stood over the victim who was lying on the

floor, and shot him three more times. Further, this Court has rejected the idea that a trial court must sua sponte instruct a jury on the doctrine of imperfect self-defense, and no Michigan appellate court has held that a trial court should have given an instruction on imperfect self-defense where none was requested. *Butler, supra*; *Amos, supra*,

B. Sufficiency of the Evidence

Defendant claims that the evidence was insufficient to sustain his conviction of second-degree murder.[5] He did not need to take any special steps to preserve this issue for appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). By his argument, he invokes his constitutional right to due process of law. *Id.*

To determine whether the evidence presented at trial was sufficient to sustain the conviction, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Grayer*, 252 Mich App 349, 355; 651 NW2d 818 (2002).

A conviction for the offense of second-degree murder requires proof of (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Second-degree murder is a general intent crime, which mandates proof that the killing was "done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). This concept is also known as malice. *People v Stiller*, 242 Mich App 38, 43; 617 NW2d 697 (2000).

Defendant specifically contends that the evidence was insufficient for the second-degree murder verdict because he was acting in self-defense and because the testimony by the prosecutor's witnesses was unreliable. We disagree. This case presented witness credibility contest. Defendant's testimony, which conflicted with the testimony of several of the prosecutor's witnesses, created a question of witness credibility. Questions of credibility and intent should be left to the trier of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Further, it was undisputed at trial that defendant and the victim exchanged words after the victim fouled one of defendant's moves during a basketball game. Defendant left the gymnasium and returned about ten minutes later with a gun. It was also undisputed that the victim struck defendant in what appeared to be an attempt to disarm him. Defendant did not dispute the prosecutor's witnesses who testified that, after the first gunshot, the victim fell to the floor; defendant stood over the victim and shot him two or three more times. Defendant's aunt testified that defendant tended to "get even" with those who provoked him. We conclude that this evidence was sufficient for a finding by a rational trier of fact of the element of malice in that "the killing was done with an intent to kill,

[5] Defendant also cursorily asserts that the conviction was against the great weight of the evidence. Because defendant failed to preserve this issue by moving for a new trial below, and because it is not properly briefed or argued, we do not address this claim. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *Herndon*, *supra.*

C. Proportionality of Defendant's Sentence

Defendant argues that his sentence to life imprisonment is disproportionate in light of the offense and his background. Because defendant committed the offenses of which he was convicted in the year 2000, the legislative sentencing guidelines were used to determine the recommended range of defendant's minimum sentence. MCL 769.34(2). However, we note here that it is evident from defendant's argument on appeal that he is under the incorrect assumption that he was sentenced under the judicial guidelines.

Defendant does not dispute that the life sentence for his second-degree murder conviction was within the appropriate guidelines sentencing range. "[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45. Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). Accordingly, for cases governed by the Legislature's sentencing guidelines, proportionality review is inappropriate except where the trial court has exercised its statutorily granted discretion to depart from the sentencing range recommended by the guidelines. *Hegwood, supra* at 437, n 10. Because defendant's life sentence falls within the appropriate legislative guidelines range, this Court may not consider a challenge to the proportionality of defendant's sentence.

Nonetheless, defendant argues that his life sentence is disproportionately high because the trial court did not consider the fact that defendant had no prior record and because defendant expressed remorse at sentencing. The Legislative guidelines already takes into account the absence of a prior criminal record. Further, the lower court record shows that defendant did not express remorse at sentencing. Rather, he explained that the shooting occurred out of self-defense. Defendant also argues that the trial court failed to articulate its reasons for imposing a life sentence. Because this sentence was not a departure, the trial court did not need to articulate substantial and compelling reasons for the sentence. MCL 769.34(3); *Hegwood, supra.* Defendant also claims that the trial court failed to take into account the fact that defendant was mentally impaired. This misstates the record. A competency evaluation of defendant had concluded that defendant was neither mentally ill or mentally retarded at the time of the offense.

Defendant next asserts that his life sentence constitutes cruel and unusual punishment. Defendant's sentence is proportionate to the offense and the offender, and thus it is not cruel or unusual. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

D. Cumulative Error

Defendant finally argues that that the cumulative effect of the asserted and other errors denied him a fair trial. We review a cumulative error claim to determine if the combination of alleged errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even where the individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich

App 643, 659-660; 601 NW2d 409 (1999). In order for reversal to be warranted on the basis of cumulative error, the errors at issue must be of consequence. *Id.* In this case, the instances of arguably questionable argument by the prosecutor were not errors of consequence, and reversal is unwarranted. We are not persuaded that any of the errors that defendant proffers affected the outcome of the trial.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Michael J. Talbot

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREI LAMAR WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
October 11, 2002

No. 224727
Saginaw Circuit Court
LC No. 99-017068-FC

Before: Markey, P.J., and Cavanagh and R.P. Griffin*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to a term of thirty-nine to sixty years' imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals by right. We affirm.

Defendant challenges both the weight and sufficiency of the evidence against him. We decline to address defendant's great weight argument because defendant did not preserve this issue in an appropriate motion for a new trial. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987). Although the sufficiency issue may be addressed on appeal, *id.*, we find the evidence sufficient. Although many witnesses gave conflicting testimony and some recanted prior identifications of another person as the shooter, four witnesses at trial identified defendant as the shooter. Three of those witnesses were not impeached by prior inconsistent identifications. Defendant's fingerprint was found on a bullet box containing bullets consistent with those used in the shooting. Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's identity as the shooter beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Defendant next argues the prosecutor exercised peremptory challenges with a discriminatory intent to exclude African-Americans from the jury, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree. One African-American remained on the jury, and the prosecutor provided race-neutral explanations for excluding two other jurors. The trial court did not abuse its discretion in concluding that the

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

prosecutor exercised peremptory challenges in a non-discriminatory manner. *Id.* at 97-98; *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997).

We also reject defendant's challenge to the search of his jail cell, which led to the seizure of impeachment evidence that was used at trial. A prisoner has no legitimate expectation of privacy in a jail cell. *Hudson v Palmer*, 468 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984). This rule applies to pre-trial detainees. *People v Phillips*, 219 Mich App 159, 162; 555 NW2d 742 (1996). Although it is factually similar, we disagree that *United States v Cohen*, 796 F2d 20 (CA 2, 1986), applies to invalidate the search. The Supreme Court in *Hudson* cited prison security as a basis for its conclusion that a prisoner has no legitimate expectation of privacy in his cell and, therefore, that a Fourth Amendment analysis does not apply. *Cohen* used prison security as a test of the *reasonableness* of a search – in other words, the court in *Cohen* assumed that some level of Fourth Amendment analysis should be applied. We do not read *Hudson* as permitting such an analysis. Indeed, the Court in *Hudson* refused to even consider whether a prison guard searched the cell and seized materials to harass the prisoner, stating that it would not inquire into the officer's motives because there was no Fourth Amendment protection. *Hudson*, *supra* at 529-530.[1] Accordingly, because defendant has no Fourth Amendment protection to the contents of his jail cell, the seizure of those items did not violate defendant's Fourth Amendment rights.

Defendant also argues that the search of his jail cell constituted prosecutorial misconduct denying him a fair trial. Because we have found the search to be legal, we cannot characterize it as "misconduct."

Defendant next argues that he was denied a fair trial by references to both gang activity and the use of a car in exchange for drugs. Defendant did not timely object to the gang references at trial. In fact, he actively cross-examined witnesses about the prosecutor's allegations that he was a member of a gang and that the dispute that gave rise to the killing had gang roots. To the extent that defendant affirmatively developed the challenged testimony, he has waived any error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Further, to the extent that the issue is merely considered unpreserved for failure to object, appellate relief is not warranted because defendant has not demonstrated that the challenged testimony constituted plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Finally, the court did not abuse its discretion when it denied defendant's subsequent motion for a mistrial in connection with this issue. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

Next, defendant challenges the scoring of the legislative sentencing guidelines and the proportionality of his sentence. The instructions to offense variable 3 state that the court should assign the highest number of points. Obviously, a death is a personal injury, but 100 points

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[1] Although defendant also refers to the Sixth Amendment in his statement of the issue, he does not cite that amendment, or cases decided under it, in the text of his brief. Any claim of error under the Sixth Amendment is therefore abandoned. See *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; __ NW2d __ (2002) (an appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue).

could not be assessed because of MCL 777.33(2)(b), which instructs that the court should not assess 100 points in homicide cases. As a result, the next highest level, 25 points, was the appropriate score for offense variable 3.[2]

Finally, we reject defendant's challenge to the proportionality of his sentence. Defendant was sentenced within the recommended range of the sentencing guidelines, and he has not established a scoring error or shown that his sentence was based on inaccurate information. Accordingly, the sentence must be upheld. MCL 769.34(10), *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

We affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin

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[2] We note that MCL 777.33 was amended in 2000. We offer no opinion on its effect.

Westlaw.

657 N.W.2d 121
468 Mich. 861, 657 N.W.2d 121
(Cite as: 468 Mich. 861, 657 N.W.2d 121)

H

Supreme Court of Michigan.
PEOPLE of the State of Michigan,
Plaintiff-Appellant,
v.
Kathryn Jane **HAUSER,** Defendant-Appellee.
Docket No. 122752.
COA No. 239688.

March 5, 2003.

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal and the application for leave to appeal as cross-appellant from the October 29, 2002, decision of the Court of Appeals are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J., dissents as states as follows:

Plaintiff here pleaded "no contest" to operating a motor vehicle under the influence of a controlled substance causing death, as a second offender. The issue presented is whether the trial court properly scored offense variable 3 at 25 points under the sentencing guidelines. At the time in question, M.C.L. § 777.33 provided in pertinent part:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points.
> (a) A victim was killed ... 100 points.
> (b) Life threatening or permanent incapacitating injury occurred to a victim ... 25 points.
>
> * * *
>
> (e) No physical injury occurred to a victim ... 0 points.
>
> * * *
>
> (2)(b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense. [FN1]

FN1. MCL 777.33 has since been amended to provide that 35 points are to be scored "if death results from the commission of a crime and the elements of the offense or attempted offense involve the operation of a motor vehicle ... under the influence or while impaired causing death." MCL 777.33(2)(c).

MCL 777.1(c) defines "homicide" as "any crime in which the death of a human being is an element of that crime."

In this case, a victim was killed. Because the death of a human being is an element of "operating a motor vehicle under the influence of a controlled substance causing death," the sentencing offense here, offense variable 3 cannot be scored at 100 points. Offense variable 3 also cannot be scored at 0 points, because there was "physical injury ... to a victim." Finally, offense variable 3 *should* be scored at 25 points because a "[l]ife threatening ... injury occurred to a victim." Indeed, the victim was injured to the point of ****122** death. For this reason, I believe that the trial court properly scored offense variable 3 at 25 points, and that the Court of Appeals erred in scoring OV-3 at 0 and reversing the order of the trial court. I would reinstate the trial court's order sentencing defendant to seven to fifteen years in prison.

468 Mich. 861, 657 N.W.2d 121

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VW 00-42319 DD

Order

Michigan Supreme Court
Lansing, Michigan

Entered: March 7, 2003

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

122752
& (33)
(34)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

KATHRYN JANE HAUSER,
Defendant-Appellee.
_____/

SC: 122752
COA: 239688
Oakland CC: 00-173663-FH

AMENDMENT TO ORDER

On order of the Court, the order of March 5, 2003 is amended to correct a clerical error by adding, after the text of the statement by Markman, J., the following:

"Young, Jr., J., joins in the statement by Markman, J."

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 7, 2003 Corbin R. Davis

Clerk

ATTACHMENT C

2000 PA 27

House Legislative Analysis Section
House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

SENTENCING GUIDELINES REVISIONS

Senate Bill 373 (Substitute H-2)
First Analysis (5-25-00)

Sponsor: Sen. William Van Regenmorter
House Committee: Criminal Law and Corrections
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Except when a mandatory sentence for a particular offense is prescribed by law, Michigan's criminal justice system uses an indeterminate sentencing policy. Maximum sentences for criminal offenses are specified in statute and a judge imposes a minimum sentence. Some people had long been concerned that this sentencing system failed to provide an evenhanded statewide standard for punishment of criminals. They contended that the broad discretion afforded judges had contributed to sometimes vast sentencing disparities in which two similar offenders could receive widely differing criminal sentences. In 1979, the Michigan Supreme Court appointed an advisory committee to research and design a sentencing guidelines system. A revised version of those judicial guidelines was in effect from October 1, 1988, until January 1, 1999, when statutory sentencing guidelines took effect.

Public Act 445 of 1994 established the Michigan Sentencing Commission and charged it with designing and recommending to the legislature a new sentencing guidelines system. The commission began its work in May 1995, with the goal of developing sentencing guidelines that would provide for the protection of the public, treat offenses involving violence against a person more severely than other offenses, and be proportionate to the seriousness of the offense and the offender's prior criminal record. On October 22, 1997, the commission adopted its recommendations for a set of sentencing guidelines and submitted them to the legislature for its approval. Public Act 317 of 1998 [enrolled House Bill 5419] essentially codified the commission's recommendations. The act established statutory sentencing guidelines for judges' use, beginning on January 1, 1999, in determining and imposing appropriate minimum sentences for people convicted of felonies.

Since the enactment of the statutory sentencing guidelines, however, several concerns have arisen. A significant number of crimes are not part of the current guidelines either because they were overlooked or have been enacted since the guidelines were drafted, and many urge that these crimes should now be made a part of the guidelines. In addition, some feel that certain crimes have lower recommended sentences under the guidelines than are appropriate and would like to see the guidelines changed to address these crimes with punishments more in line with the perceived severity of the crime.

THE CONTENT OF THE BILL:

Senate Bill 373 would amend the Code of Criminal Procedure to revise the statutory sentencing guidelines provisions. The bill would do all of the following:

-- Classify a number of felonies that were accidentally omitted or were enacted after the sentencing guidelines were enacted.

-- Change the class designation of several felonies.

-- Revise requirements for the assessment of offense variable points and the conditions of some of the offense variables.

-- Limit the scoring of convictions to the conviction with the highest crime class, except in cases of consecutive sentences.

-- Take effect October 1, 2000.

The bill would add a number of crimes to the sentencing guidelines list that were enacted in 1998 for various larceny and property destruction offenses; new and revised penalties that were enacted in 1998 when explosives offenses were revised and re-codified; new offenses and penalties enacted in 1998 for human cloning, unauthorized process to obstruct a public

Senate Bill 373 (5-25-00)

officer or employee, and assault or gross negligence against a pregnant woman resulting in miscarriage or stillbirth; and various offenses enacted or revised in 1999. In the case of new graduated penalties enacted for previously existing offenses, the bill would reclassify some of the offenses as a higher level felony within the sentencing guidelines offense list, due to the enactment of longer statutory maximum sentences for those offenses. The bill also would add felonies that were omitted when the guidelines were enacted by Public Act 317 of 1998. These include aggravated stalking and the manufacture, delivery, possession with intent to deliver, or possession of 225 grams or more, but less than 650 grams, of a Schedule 1 or 2 narcotic or cocaine.

The bill would also change the class designation of several felonies in the sentencing guidelines list. (Class designations are used to determine which sentencing grid is used.) First-degree child abuse would move from Class C to Class B. Perjury in a capital case would move from Class G to Class B. Perjury in a non-capital case would move from Class G to Class C. Subornation of perjury would move from Class E to Class C. Criminal sexual conduct, third degree would move from Class C to Class B.

The code provides that, if a statute mandates a minimum sentence, the court must impose a sentence under that statute, and imposing a mandatory minimum sentence is not a departure under the sentencing guidelines. In addition, if a statute mandates a minimum sentence and authorizes a departure from that sentence, a sentence that exceeds the recommended range but is less than a mandatory minimum sentence does not constitute a departure under the sentencing guidelines. The bill would further provide that where the Michigan Vehicle Code mandates a minimum sentence and authorizes the sentencing judge to impose a sentence that is less that minimum sentence, it would not be a departure to impose a sentence that exceeded the recommended sentence range but was less than the mandatory minimum.

Under the guidelines, before a court sentences a person, a probation officer is required to prepare and provide to the court a report that includes, among other things, the sentence grid containing the recommended minimum sentence ranges for each conviction and the computation that determines the recommended minimum sentence range for each conviction. Under the bill, in cases where a person was convicted of more than one crime, the computation to determine the recommended minimum sentence would only have to be performed on the crime with the highest crime class and the sentence grid containing recommended minimum sentence would only have to be provided for the crime with the highest crime class. However, the sentence grid and computation would have to be performed on every conviction for which a consecutive sentence was authorized or required. [Note: A reference to this change contains a typographical error – the change is made in Chapter XI, Section 14 but the reference is to Chapter IX, Section 14.]

Changes would also be made to Offense Variable 3 - physical injury to the victim. This variable would include 35 points for a crime that resulted in the death of a victim and the elements of that crime involved the operation of a vehicle, vessel, off-road vehicle (ORV), snowmobile, aircraft, or locomotive while under the influence or while impaired.

The bill would remove language that limited the application of offense variable 5 (psychological injury to a member of a victim's family) to cases of homicide, which would allow the variable to also apply to cases of attempted homicide and assault with intent to murder. Offense variable 18 (operator ability affected by alcohol or drugs) would be amended to apply not only to the operation of a vehicle, but to the operation of a vessel, off-road vehicle, snowmobile, aircraft, or locomotive, as well.

Prior record variable 4 (prior low severity juvenile adjudications) would include a new category that would provide 15 points for five or more such prior offenses, and the bill would shift the ten point provision to three or four prior offenses, and make five points apply for two such prior offenses. Prior record variable 5 (prior misdemeanor convictions or misdemeanor juvenile adjudications) would include off-road vehicles and snowmobiles in the provisions regarding operating under the influence. Further, this provision would include attempted offenses.

HOUSE COMMITTEE ACTION:

The House Committee on Criminal Law and Corrections adopted a substitute bill that, among other things, re-instated the crime categories. The guidelines' framework employs a system of crime classifications, based mostly on the seriousness of the offense, and crime categories, based on the type of offense. The crime class identifies which guidelines grid is to be used to determine an offender's minimum sentence, while the category identifies which offense variables to apply when determining a sentencing guidelines score. These categories outline for probation officers (who prepare pre-sentencing reports), judges, and attorneys

the type and amount of points that may be scored to determine a person's sentence depending on whether the crime was an offense against a person, a property offense, a controlled substance offense, or an offense of public trust, public safety, or public order. Further, instead of reclassifying some crimes, the bill would provide for 35 points to be applied under offense variable 3; and removed a provision that would have required 50 points to be scored under offense variable 13 (continuing pattern of criminal activity) if the offense involved multiple sexual penetrations against a person or persons under the age of 16.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, several changes in the bill could have an impact on state and local correctional costs:

• It would elevate various offenses from one crime class to a crime class of higher severity, including the elevation of third-degree criminal sexual conduct from class C to class B. This change would tend to increase sentence length, with accompanying increases in state and local correctional costs. The Department of Corrections has estimated that the change with regard to third-degree criminal sexual conduct could result in the need for an additional 200 prison beds by the time the impact is fully felt, which would take about five years.

• By requiring certain additional offense variables to be scored, the bill would provide for higher offense scores for assault with intent to commit murder. Higher offense scores would tend to drive offenders into higher minimum sentences, and thus could increase state or local correctional costs. To the extent that offenders were sentenced to prison instead of local sanctions, it could increase state costs while reducing costs that otherwise could have fallen on counties.

• The bill would provide for 35 points to be assigned for an offense where death was caused by violation of any of various statutes prohibiting operation of a vehicle while drunk or impaired. This change would have an indeterminate impact on state and local corrections costs, depending on current scoring methods.

• The bill would increase from 10 to 15 the number of points assigned to an offender who has five prior low severity juvenile adjudications. This would tend to drive such offenders into longer minimum sentences, with attendant costs for the state or local units of government. To the extent that offenders who otherwise would have received local sanctions were sentenced to prison, this change could increase state costs while decreasing costs that otherwise could have fallen to counties.
(5-24-00)

ARGUMENTS:

For:
The bill would add to the sentencing guidelines several crimes and penalties that were enacted or revised in 1998 and 1999, after the date of the guidelines' enactment. This is necessary to ensure that the statutory sentencing guidelines remain broad, consistent, and up to date with current criminal justice policies in Michigan. However, consideration should be given to establishing a clear process for additions and revisions to the sentencing guidelines. This bill provides adequate lead time for those who work in the criminal justice system to learn about the new additions to the guidelines before they take effect (which has not been true of all amendments to the guidelines).

For:
The statutory sentencing guidelines enacted in 1998 provide courts across the state with a comprehensive and uniform system for sentencing criminals on a consistent and appropriate basis, while giving judges the flexibility to depart from the guidelines for substantial and compelling reasons. The sentencing guidelines also were designed to divert some nonviolent offenders from prison sentences toward intermediate sanctions such as probation, while steering more violent offenders to prison. Generally, the sentencing guidelines seem to have been drawn to accomplish those objectives. However, there are some problems with some of the guidelines for drunk driving cases where a death occurs and some other crimes, including third degree criminal sexual conduct and first degree child abuse, which arguably should be classified higher. By changing the class designation of some of these offenses and by requiring that 35 points be added to crimes where death results from the operation of a motor vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence or while impaired, the bill would improve some of the apparent flaws in the guidelines without uprooting the entire sentencing guidelines scheme.

Against:
The House version of the bill is significantly weakened. The version of the bill that passed the Senate would have eliminated the guidelines' system of categories. The sentencing guidelines crime categories impose an

extra step in reaching a guidelines score, further complicating a system that is already quite complex. Eliminating the crime categories would simplify the sentencing guidelines procedures and make calculation of guidelines scores consistent for all criminals. In addition, according to one member of the sentencing commission, the crime categories originally were thought to be necessary because the commission anticipated a system that would have around 100 offense variables. Since the commission's final recommendation and the enacted guidelines include only 19 variables, applying them all when determining a sentence would not be cumbersome.

Response:

The Senate-passed version of the bill would constitute a sweeping change in the sentencing guidelines' application which not only is wholly unnecessary, but also, according to testimony before the House Committee on Criminal Law and Corrections, violates agreements that allowed the enactment of both the sentencing guidelines and the truth-sentencing provisions. Further, the 1994 enabling legislation for the sentencing commission prohibited the commission from recommending modifications to the sentencing guidelines for at least two years after they were enacted. The guidelines should be given more time to operate, and their application and usefulness should be assessed, before the guidelines are significantly amended.

The crime categories are a crucial component of calculating sentencing guidelines scores. By requiring that all offense variables be scored for each offender, the Senate-passed version of the bill would eliminate some of the safeguards built into the sentencing guidelines system and could result in points' being inappropriately assessed for a given offender, which in turn could result in an inordinately long and unfair sentence. This would be unjust and could drive up the cost to the state and local units for incarcerating criminal offenders. In addition, it could result in more appeals of sentences because of disagreements over which offense variables should be scored. The bill could inadvertently and unnecessarily increase the caseload of the court of appeals. Further, the attempt to eliminate the category provisions simply because of some dissatisfaction with the guidelines recommendations regarding certain crimes, ignores the fact that judges could and probably would exceed the guidelines when they felt that the recommended sentence did not fit the crime.

Understanding the application of the statutory sentencing guidelines involves a steep learning curve and is a daily challenge to all who deal with them in the criminal justice system. Significant changes to the statutory sentencing guidelines this soon after their genesis would require the retraining of thousands of court officers and legal practitioners; the printing of about 40,000 new sentencing guidelines manuals, or at least extensive revisions of the manuals already published and distributed; and, depending on the date of the offense, confusion over which set of three different sentencing guidelines systems to apply for a given conviction (the former judicial sentencing guidelines, the current statutory guidelines, or the statutory guidelines with revisions proposed by the bill).

Reply:

It should be a simple matter, based on the date of an offense, to determine which sentencing guidelines system was in effect. Extensive retraining would not be necessary, as the bill would not overhaul the system, but only change the offense class and offense variables for some crimes and revise how points are scored in determining a sentence. Further, as stated above, the removal of the categories would simplify the process.

Against:

One of the particular problems with the guidelines is that some offenders who have committed certain sex crimes, even ones with prior convictions, are recieving recommendations under the current guidelines that are more lenient than the minimum recommended sentence would have been under the former, judicially created guidelines. In particular, a repeat offense of criminal sexual conduct involving penetration against a child under the age of 16 deserves harsher penalties than the current guidelines recommend. The Senate version of the bill would have provided for the addition of 50 points to be scored under offense variable 13 (continuing pattern of criminal activity) if the offense involved multiple sexual penetrations against a person or persons under the age of 16. This would have assured that the sentencing recommendations under the new guidelines would be more severe for pedophiles. By failing to impose these revisions, the House committee substitute could fail to require prison for some of these very dangerous and heinous criminals.

Response:

First, this change in the guidlines could have significantly increased prisons costs -- according to DOC estimates this could have resulted in a need for 763 additional beds. Furthermore, it would have likely resulted in recommendations that would be far too harsh in certain cases, e.g., cases of consensual sexual activity between a 17-year-old and a 15-year-old. By contrast, the committee substitute would only require an additional 238 beds, and would not have the

Senate Bil 3 (5-25-00)

presumably unintended consequence of recommending prison time for consensual sexual activity between teenagers.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bill. (5-24-00)

The Department of Corrections supports the bill. (5-24-00)

Mothers Against Drunk Driving supports the bill. (5-24-00)

The Citizens Alliance on Prisons and Public Safety takes no position on the bill. (5-24-00)

Analyst: W. Flory

This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

Senate Fiscal Agency
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Lansing, Michigan 48909-7536

SFA BILL ANALYSIS

Telephone: (517) 373-5383
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Senate Bill 373 (Substitute S-9 as passed by the Senate)
House Bill 4640 (as enrolled)
Sponsor: Senator William Van Regenmorter (Senate Bill 373)
Representative Jennifer Faunce (House Bill 4640)
Senate Committee: Judiciary
House Committee: Criminal Law and Corrections (House Bill 4640)

PUBLIC ACT 227 of 1999

Date Completed: 1-21-00

RATIONALE

Except when a mandatory sentence for a particular offense is prescribed by law, Michigan's criminal justice system uses an indeterminate sentencing policy. Maximum sentences for criminal offenses are specified in statute and a judge imposes a minimum sentence. Some people had long been concerned that this sentencing system failed to provide an evenhanded statewide standard for punishment of criminals. They contended that the broad discretion afforded judges had contributed to sometimes vast sentencing disparities in which two similar offenders could receive widely differing criminal sentences. In 1979, the Michigan Supreme Court appointed an advisory committee to research and design a sentencing guidelines system. A revised version of those judicial guidelines was in effect from October 1, 1988, until January 1, 1999, when statutory sentencing guidelines took effect.

Public Act 445 of 1994 established the Michigan Sentencing Commission and charged it with designing and recommending to the Legislature a new sentencing guidelines system. The Commission began its work in May 1995, with the goal of developing sentencing guidelines that would provide for the protection of the public, treat offenses involving violence against a person more severely than other offenses, and be proportionate to the seriousness of the offense and the offender's prior criminal record. On October 22, 1997, the Commission adopted its recommendations for a set of sentencing guidelines and submitted them to the Legislature for its approval.

Public Act 317 of 1998 essentially codified the Commission's recommendations. The Act established statutory sentencing guidelines for judges' use, beginning on January 1, 1999, in determining and imposing appropriate minimum sentences for people convicted of felonies. Since the enactment of the statutory sentencing guidelines, however, several concerns have arisen. Particularly, in the case of some violent offenses for which imprisonment might be considered appropriate, the guidelines steer the sentence toward intermediate sanctions, which do not include prison time. Some people believe that the sentencing guidelines should be amended to include some offenses left out of Public Act 317, change some felony classifications, remove the crime categories, clarify provisions regarding intermediate sanctions and departures, and revise some scoring instructions.

CONTENT

Senate Bill 373 (S-9) would amend, and House Bill 4640 amended, the Code of Criminal Procedure to revise the sentencing guidelines provisions. The Senate bill would do all of the following:

- **Include additional offenses and penalties in the guidelines.**
- **Require sentencing judges to score all of the offense variables for each offender.**
- **Change the class designation of several felonies.**
- **Require the addition of 50 points to an offender's guidelines score for an**

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offense that was part of a pattern of criminal activity involving two or more sexual penetrations against a child or children under 16.

-- Revise requirements for the assessment of offense variable points and the conditions of some of the offense variables.

House Bill 4640 does all of the following:

-- Provides that, if a statute mandates a minimum sentence but allows a departure, a departure under that statute is not a departure under the guidelines.

-- Removes a requirement that an intermediate sanction that includes a term of imprisonment, under certain circumstances, not be less than the minimum recommended sentence range.

-- Revises the assessment of points under offense variable 13.

Senate Bill 373 (S-9) would take effect 90 days after its enactment. House Bill 4640 took effect on December 28, 1999.

Senate Bill 373 (S-9)

The bill would add to the sentencing guidelines list graduated penalties that were enacted in 1998 for various larceny and property destruction offenses; new and revised penalties that were enacted in 1998 when explosives offenses were revised and recodified; new offenses and penalties enacted in 1998 for human cloning, unauthorized process to obstruct a public officer or employee, and assault or gross negligence against a pregnant woman resulting in miscarriage or stillbirth; and various offenses enacted or revised in 1999. In the case of new graduated penalties enacted for previously existing offenses, the bill would reclassify some of the offenses as a higher level felony within the sentencing guidelines offense list, due to the enactment of longer statutory maximum sentences for those offenses. The bill also would add felonies that were omitted when the guidelines were enacted by Public Act 317 of 1998. These include aggravated stalking and the manufacture, delivery, possession with intent to deliver, or possession of 225 grams or more, but less than 650 grams, of a Schedule 1 or 2 narcotic or cocaine.

The offenses in the Code's sentencing guidelines provisions are divided into six categories: crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, or crimes against public safety. The categories are used to determine which of the 19 offense variables specified by the Code are to be considered and scored by a sentencing judge when determining a recommended minimum sentence range. The bill would eliminate all of the categories except "person" and "property" and repeal the section of the Code that instructs judges on which offense variable to score for a given offense category. The bill would require, instead, that a sentencing judge score *all* of the offense variables for each offender.

The bill would change the class designation of several felonies in the sentencing guidelines list. (Class designations are used to determine which sentencing grid is used.) Causing death to a person due to drunk operation of a motor vehicle, boat, or snowmobile would move up from a Class C offense to Class B. Assault with intent to do great bodily harm less than murder would move from Class D to Class C. First-degree child abuse would move from Class C to Class B. Third-degree criminal sexual conduct would move up from a Class C offense to Class B. Several perjury offenses also would move up in class.

The bill would require 50 points to be added to an offender's sentencing guidelines score under offense variable 13 (continuing pattern of criminal activity) if the offense involved two or more sexual penetrations against a person or persons under 16 years of age. The bill also would limit the application of offense variable 5 (psychological injury to a member of a victim's family) to homicide, attempted homicide, or assault with intent to murder. Offense variable 17 (degree of negligence exhibited) could be applied only if an element of the offense involved the operation of a motor vehicle, vessel, off-road vehicle, snowmobile, aircraft, or locomotive.

House Bill 4640

The Code provides that, if a statute mandates a minimum sentence, the court must impose a sentence pursuant to that statute, and imposing a mandatory minimum sentence is not a departure under the sentencing guidelines. The bill specifies, in addition, that if a statute mandates a minimum sentence and authorizes a departure from that sentence, a sentence that exceeds the recommended range but is less than a mandatory minimum sentence does not constitute a departure under the sentencing guidelines.

Under the Code, intermediate sanctions must be imposed under certain circumstances. If the upper limit of the guidelines' recommended minimum sentence exceeds 18 months and the lower limit is 12 months or less, the court must sentence the offender, absent a departure, either to imprisonment with a minimum term within the recommended range or to an intermediate sanction that may include a term of imprisonment of not more than 12 months. The bill removed an additional requirement that a term of imprisonment imposed pursuant to an intermediate sanction be not less than the minimum range.

Offense variable 13 is a continuing pattern of criminal behavior. The Code previously required that 25 points be assessed when the offense was part of a pattern of felonious criminal activity involving three or more crimes against property. The bill reduced the required number of points to five. (The Code also requires 25 points for offense variable 13 when the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person, and 10 points when the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property.)

MCL 777.1 et al. (S.B. 373)
769.34 et al. (H.B. 4640)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The statutory sentencing guidelines enacted in 1998 provide courts across the State with a comprehensive and uniform system for sentencing criminals on a consistent and appropriate basis, while giving judges the flexibility to depart from the guidelines for substantial and compelling reasons. The sentencing guidelines also were designed to divert some nonviolent offenders from prison sentences toward intermediate sanctions such as probation, while steering more violent offenders to prison. Generally, the sentencing guidelines seem to have been drawn to accomplish those objectives.

It appears, though, that there are some instances in which a violent offender, even one with prior convictions, may be given intermediate sanctions rather than prison time under the sentencing guidelines system. The crimes for which offenders are likely to be pointed toward intermediate sanctions, but perhaps should be imprisoned, include third-degree criminal sexual conduct (which involves penetration); first-degree child abuse; drunk driving causing death, even with two previous drunk driving convictions; assault with intent to do great bodily harm, even if the convicted person is a habitual offender; perjury in a trial for a life-maximum offense; and certain pedophilia cases in which there are no offense variable points for multiple previous penetrations. Indeed, an Oakland County assistant prosecutor who testified before the Senate Judiciary Committee cited several sex-crime cases in which the statutory guidelines' minimum sentence range is more lenient than the minimum recommended sentence under the former, judicially created guidelines.

By changing the class designation of some violent offenses and requiring 50 points to be scored under offense variable 13 (continuing pattern of criminal activity) if the offense involved multiple sexual penetrations against a person or persons under the age of 16, Senate Bill 373 (S-9) would go a long way toward ensuring that some violent offenders were more likely to receive a prison sentence and not intermediate sanctions. This would be in keeping with the aim of the original statutory sentencing guidelines recommendations to subject violent and repeat offenders to prison time, while opening up intermediate sanction possibilities to more nonviolent and first-time offenders.

Supporting Argument

Senate Bill 373 (S-9) would add to the sentencing guidelines several crimes and penalties that were enacted or revised in 1998 and 1999, after the date of the guidelines' enactment. This is necessary to ensure that the statutory sentencing guidelines remain broad, consistent, and up-to-date with current criminal justice policies in Michigan.

Supporting Argument

House Bill 4640 primarily made technical corrections to the 1998 legislation that created the sentencing guidelines. Substantively, the bill specifies that a sentence imposed under a statute prescribing a mandatory minimum sentence does not constitute a departure under the sentencing guidelines, if the sentence imposed exceeds the guidelines' recommended minimum range but is less than the mandatory minimum.

Opposing Argument

The guidelines' framework employs a system of crime classifications, based mostly on the seriousness of the offense, and crime categories, based on the type of offense. Crime classes identify which guidelines grid is to be used to determine an offender's minimum sentence, while categories identify which offense variables to apply when determining a sentencing guidelines score. These categories serve a useful purpose in that they outline for probation officers (who prepare presentencing reports), judges, and attorneys the type and amount of points that may be scored to determine a person's sentence depending on whether the crime was an offense against a person, a property offense, a controlled substance offense, or an offense of public trust, public safety, or public order. Senate Bill 373 (S-9), however, would eliminate these crime categories, with the exception of crimes against a person and property offenses, and require that *all* offense variables be scored for *all* crimes. (Crime categories for crimes against a person and property offenses would be retained because some of the offense variables take those categories into consideration.) This would constitute a sweeping change in the sentencing guidelines' application and is unnecessary and excessive. The crime categories are a crucial component of calculating sentencing guidelines scores. By requiring that all offense variables be scored for each offender, Senate Bill 373 (S-9) would eliminate some of the safeguards built into the sentencing guidelines system and could result in points' being inappropriately assessed for a given offender, which in turn could result in an inordinately long and unfair sentence. This would be unjust and could drive up the cost to the State and local units in incarcerating criminal offenders. In addition, it could result in more appeals of sentences because of disagreements over which offense variables should be scored. The bill could inadvertently and unnecessarily increase the caseload of the Court of Appeals.

Response: Sentencing guidelines crime categories impose an extra step in reaching a guidelines score, further complicating a system that is already quite complex. Eliminating the crime categories would simplify the sentencing guidelines procedures and make calculation of guidelines scores consistent for all criminals. In addition, according to one member of the Sentencing Commission, the crime categories originally were thought to be necessary because the Commission anticipated a system that would have around 100 offense variables. Since the Commission's final recommendation and the enacted guidelines include only 19 variables, applying them all when determining a sentence would not be cumbersome.

Opposing Argument

Understanding the application of the statutory sentencing guidelines involves a steep learning curve and is a daily challenge to all who deal with them in the criminal justice system. The 1994 enabling legislation for the Sentencing Commission prohibited the Commission from recommending modifications to the sentencing guidelines for at least two years after they were enacted, but Senate Bill 373 (S-9) passed the Senate less than one year into the life of the sentencing guidelines system and would make major changes to that system while it is still in its infancy. The guidelines should be given more time to operate, and their application and usefulness should be assessed, before the guidelines are significantly amended.

Response: While the system appears generally to have been well developed, some problems, particularly the sentencing of some sex offenders, are glaring and must be corrected immediately. Delaying these revisions could result in the failure to imprison some very dangerous and heinous criminals.

Opposing Argument

Senate Bill 373 (S-9) could cause some practical problems for those who work in the criminal justice system. Significant changes to

the statutory sentencing guidelines this soon after their genesis would require the retraining of thousands of court officers and legal practitioners; the printing of about 40,000 new sentencing guidelines manuals, or at least extensive revisions of the manuals already published and distributed; and, depending on the date of the offense, confusion over which set of three different sentencing guidelines systems to apply for a given conviction (the former judicial sentencing guidelines, the current statutory guidelines, or the statutory guidelines with revisions proposed by the bill).

Response: It should be a simple matter, based on the date of an offense, to determine which sentencing guidelines system was in effect. Extensive retraining would not be necessary, as the bill would not overhaul the system, but only change the offense class and offense variables for some crimes and revise how points are scored in determining a sentence.

Legislative Analyst: P. Affholter

FISCAL IMPACT

Senate Bill 373 (S-9)

The bill would have an indeterminate fiscal impact on State and local government. A report prepared by Dr. Charles Ostrum using State Court Administrative Office (SCAO) data provides information about the disposition of cases in the first nine months after the implementation of the statutory guidelines. The report, dated September 1, 1999, shows a decrease in the percentage of offenders sentenced to prison and straight probation, and an increase in the percentage sentenced to jail, and probation and jail. The report also points out that the SCAO has received fewer forms than anticipated and that the number of serious felony cases, such as second-degree murder, are underrepresented. The disposition database maintained by the Department of Corrections (DOC) is unavailable due to technical problems related to the enactment of sentencing guidelines. Other data, such as the impact on the length of sentence, are not currently available.

Although there are no data currently available that would provide information about the potential fiscal impact of any changes to the guidelines statute, the relationship between the minimum sentence range and the State and local corrections' expenditures is the amount of time that an offender will be under the supervision of the DOC or a local unit. Several factors addressed in the bill that could affect the minimum sentence range are detailed below.

The bill would eliminate language that places requirements on the minimum jail sentence a judge may impose, if jail time is given in connection with an intermediate sanction. There are no data to indicate whether this minimum requirement has affected jail sentences.

The bill would eliminate offense categories, causing all offense variables to be considered in the presentence evaluation. On the sentencing grid, offense variable points are contrasted with offender variable points to determine minimum sentence range. Under current law, of the 19 offense variables, a maximum of 13 offense variables are considered for each offense (or 15, if the offense involves the operation of a vehicle, vessel, aircraft, or locomotive). There are no data to indicate if scoring all 19 offense variables for every crime would result in higher offense variable points that would increase the length of minimum sentence.

Also, certain changes to the offense variables wording and scoring would provide additional points for offenders who match the criteria. There are no data to indicate how many offenders would qualify for additional points or whether the additional points would make a difference in the disposition and sentence length of the conviction.

House Bill 4640

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: K. Firestone

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

ATTACHMENT D

Historical and Statutory Notes

For effective date and contingent effect provisions of P.A.1998, No. 317, see the Historical and Statutory Notes following § 769.8.

Library References

Sentencing and Punishment ⇐ 783.
WESTLAW Topic No. 350H.

777.57. Prior record variable 7, scoring; definitions

Sec. 57 (1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender has 2 or more subsequent or concurrent convictions	20 points
(b) The offender has 1 subsequent or concurrent conviction	10 points
(c) The offender has no subsequent or concurrent convictions	0 points

(2) All of the following apply to scoring record variable 7:

(a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.

(b) Do not score a felony firearm conviction in this variable.

(c) Do not score a concurrent felony conviction if a mandatory consecutive sentence will result from that conviction.

P.A.1927, No. 175, c. XVII, § 57, added by P.A.1998, No. 317, Eff. Dec. 15, 1998. Amended by P.A.1999, No. 227, Imd. Eff. Dec. 28, 1999

Historical and Statutory Notes

For effective date and contingent effect provisions of P.A.1998, No. 317, see the Historical and Statutory Notes following § 769.8.

P.A.1999, No. 227, in subsec. (2)(c), inserted "mandatory"

Library References

Sentencing and Punishment ⇐ 795.
WESTLAW Topic No. 350H.

PART 6. SENTENCING GRIDS

Caption editorially supplied

777.61. Minimum sentence ranges for class M2

Sec. 61. The following are the minimum sentence ranges for class M2:

	PRIOR RECORD VARIABLE LEVEL					
Offense Variable Level	A	B	C	D	E	F
	0 points	1–9 points	10–24 points	25–49 points	50–74 points	75+ points
I						

Offense Variable Level	A 0 points	B 1–9 points	C 10–24 points	D 25–49 points	E 50–74 points	F 75+ points
0–49 points II	90–150	144–240	162–270	180–300 or life	225–375 or life	270–450 or life
50–99 points III	144–240	162–270	180–300 or life	225–375 or life	270–450 or life	315–525 or life
100+ points	162–270 or life	180–300 or life	225–375 or life	270–450 or life	315–525 or life	365–600 or life

P.A.1927, No. 175, c. XVII, § 61, added by P.A.1998, No. 317, Eff. Dec. 15, 1998.

Historical and Statutory Notes

For effective date and contingent effect provisions of P.A.1998, No. 317, see the Historical and Statutory Notes following § 769.8.

Library References

Sentencing and Punishment ⇐ 666 to 738.
WESTLAW Topic No. 350H.

777.62. Minimum sentence ranges for class A

Sec. 62. The following are the minimum sentence ranges for class A.

	PRIOR RECORD VARIABLE LEVEL					
Offense Variable Level	A 0 points	B 1–9 points	C 10–24 points	D 25–49 points	E 50–74 points	F 75+ points
I 0–19 points	21–35	27–45	42–70	51–85	81–135	108–180
II 20–39 points	27–45	42–70	51–85	81–135	108–180	126–210
III 40–59 points	42–70	51–85	81–135	108–180	126–210	135–225
IV 60–79 points	51–85	81–135	108–180	126–210	135–225	171–285
V 80–99 points	81–135	108–180	126–210	135–225	171–285	225–375 or life
VI 100+ points	108–180	126–210	135–225	171–285	225–375 or life	270–450 or life

P.A.1927, No. 175, c. XVII, § 62, added by P.A.1998, No. 317, Eff. Dec. 15, 1998.

Historical and Statutory Notes

For effective date and contingent effect provisions of P.A.1998, No. 317, see the Historical and Statutory Notes following § 769.8.

MURDER 2ND DEGREE
HABITUAL

Note: **Minimum sentence not to exceed 2/3rds of the statutory maximum as established by MCL769.10-13**
Note: **This grid reflects the statutory percentage increases rounded down to the nearest whole month. The cell range may be less than the maximum possible minimum sentence by a fraction of a month.**

PRV LEVEL

OV LEVEL

	A 0 Points		B 1 - 9 Points		C 10 - 24 Points		D 25 - 49 Points		E 50 - 74 Points		F 75+ Points	
I 0 - 49 Points	90	187 225 300	144	300 360 480	162	337 405 540	180	375/L 450/L 600/L	225	468/L 562/L 750/L	270	562/L 675/L 900/L
II 50 - 99 Points	144	300 360 480	162	337 405 540	180	375/L 450/L 600/L	225	468/L 562/L 750/L	270	562/L 675/L 900/L	315	656/L 787/L 1050/L
III 100+ Points	162	337 405 540	180	375/L 450/L 600/L	225	468/L 562/L 750/L	270	562/L 675/L 900/L	315	656/L 787/L 1050/L	365	750/L 900/L 1200/L

/ L = or LIFE

1999 SENTENCING GUIDELINES

October, 1998